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1871

ESSAY

UPON THE

Law of Contracts

AND

Agreements.

By JOHN JOSEPH POWELL, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

Ista veritas, etiamsi jucunda non est, mihi tamen grata est.

Cic.

IN TWO VOLUMES.

VOL. I.

WALPOLE, N. H.

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TO THE
R E A D E R.

VARIOUS and important as are the topics which present themselves to a student of the law of *England*, there does not appear to me any which opens so wide and extensive a field, for investigation, as that which is the subject of the following Essay. *Contracts* comprehend the whole business of human negotiations. They are applicable to the correspondence of nations, as well as to the concerns of domestic life. They include every change and relation of private property, and consequently furnish the principal subject, on which all legal and equitable jurisdiction is exercised.

But however different the objects, the contracts respecting them must uniformly be determined by the principles of natural or civil equity. Yet, although many works are extant, both in our own and foreign languages, in which those principles are applied to the rights and usages of other communities,

no treatise has hitherto appeared, written professedly to shew the connexion between those general principles, and the laws of property in *England*.

In order, therefore, to exhibit, in a compact and systematical form, the authorities extant in our books upon this subject, and by comparing them together, and examining their respective dependencies, relations, and consequences, to discover the general rules and principles of natural and civil equity on which those decisions are founded, I was induced, at an early period, among other objects, to undertake that course of reading, on which I laid the foundation of the following tracts. Satisfied that in this branch of the law, as in every other part of science, the primary object was to establish a proper and solid groundwork, by obtaining a thorough acquaintance with the principles by which it is governed.

In pursuing this plan, I sought for no doubtful points to examine, obscurities to elucidate, or errors to detect; but when, in the process of this work, such difficulties presented themselves, I was not deterred by the influence of names, from canvassing, explaining, and exposing them to the reader.

Perhaps there may be some, to whom such conduct may appear not strictly justifiable, as tending to
diminish

diminish that respect with which we ought to look up to those, whose duty it is to administer the laws, in a well regulated state : I confess my mind is impressed with a different opinion ; I cannot conceive it possible if, in taking a comprehensive view of the numerous decisions which have been made in this extensive branch of the Law, one or two instances should occur wherein analogy may have been overlooked, or principle disregarded, it will furnish any imputation on the wisdom, integrity, or diligence of those who sat in judgment on such occasions. On the contrary, I was astonished to find, that an attentive examination should not have discovered among the almost innumerable questions of property, which the extensive reciprocal intercourse of this great and commercial empire cause to be judicially agitated, not more than one or two errors in judgment, and the developement of which (if they should be admitted to be errors) can be attended with no other very important advantages, except the preservation of uniformity in legal determinations, could be discovered.

All reasoning must be founded on first principles. The science of the Law derives its principles either from that artificial system which was incidental to the introduction of feuds, or from the science of morals.

morals. And, without a knowledge of these principles, we can no more establish a conclusion in law, than we can see with our eyes shut, measure without a standard, or count without arithmetic.

If the preceding observations be founded in truth, and all general science be reducible into first principles, the same remark will likewise apply to every distinct branch of each particular science. Thus the law will have its principles of descent, its principles of purchase, its principles of representation, its principles of construction of instruments. For instance, it is a rule of construction that where, in several instruments made *in pari materia*, different words are used importing ideas of different things, *those words* shall not be taken to mean the same thing: Thus where one act of parliament, made to regulate gaming, speaks of a gaming contract, and a subsequent act of parliament, made likewise to regulate gaming, speaks of a security taken at the time of gaming, the one act has been expounded to intend the contract, and the other only the security: Now, this conclusion must have been founded upon some principle, on which it must ultimately rest. I take the principle to have been this, that as, in a formal instrument, made with deliberation, in which language is

used

used technically, the same words must be taken to import the same signification throughout, so, in such instruments, a different penning must be taken to import a different meaning or signification. This must be allowed as a self-evident principle, as it is one, without the admission of which, there could be no rule to find out the true and genuine sense of language. If this be conceded, it follows of course, that wherever an instrument or instruments, in which the same circumstance occurs, is or are to be discussed and construed, recourse must be had to this principle, and all our conclusions upon the import of words, expressing different ideas, must be established on its basis. This proposition cannot be denied, without denying the axiom in logic ; that in reasoning, the same consequences will, in all cases, invariably follow from the same premises ; I have therefore ventured, where this truth has been neglected, to expose the defect, and for the sake of analogy, without a due attention to which the law must cease to be a rational and demonstrative science, to contend even against authority, when so circumstanced, as appearing to me not to be founded in law.

If I have argued against the propriety, or strict legality of blending together legal and equitable rights,

as an innovation upon our system of jurisprudence, and subversive of its first principles ; it has not proceeded from a disposition, in itself inimical to such temporary modifications of the law, as must and ought to be made to fit it to the exigencies of civil society, at different periods and under varying circumstances ; but from a conviction that this secondary principle of accommodation, must not be extended so far, as to permit the warping of fundamental principles, to which we must adhere with a sacred veneration, if we wish to preserve that constitution of government under which we have the happiness to live. For what security has the constitution, if it be not in the *internal policy* of our country, exhibited in that wise and benevolent administration of commutative justice, according to those great principles and maxims of law and equity, which have been ratified by the sanction of successive ages ? *QUOD BONI EST JUDICIS AMPLIARE JURISDICTIONEM*, is a wise maxim, *when properly understood*. Taken in its *true and genuine* sense it means, that a judge should so model and adapt the rules and principles of justice to the exigencies of mankind, that they may accommodate all times, manners and circumstances. But a power to model and adapt, by no means involves

a power to create or annihilate. The former belongs to construction, the latter to legislation. That a right in itself purely legal cannot be the proper subject of discussion in a jurisdiction purely equitable, and that a right purely equitable, cannot be the proper subject of a purely legal jurisdiction, are axioms which cannot be denied, so long as the law recognizes a distinction between legal and equitable rights. It is a proposition as self-evident, as that blue is not red, or white black.

Every man who is acquainted with the law of *England*, knows that law and equity, although they aim at the same end, which is to do justice, are distinctly administered in their respective courts, by their particular judges, and rules of justice. The chancellor is invested with an extraordinary and uncontrollable power to judge according to that which is alleged and proved. He has authority to direct the use of a legal right to an equitable purpose, if he can obtain evidence of facts, which prove, that in *conscience* it ought to be so applied; but the judges of the common law have no such authority, they are to judge according to a strict and ordinary or limited power. So long as these jurisdictions continue distinct, so long must the rights also over which they have jurisdiction. A pure trust may be judged of at law, but it

a mere legal claimant, having no equitable principle in his favour. If a judgment, founded upon these premises, can be deemed law, all reasoning upon legal and equitable rights is at an end, no distinction subsists between them. Such an adjudication must be abandoned, or rest upon the maxim "*set pro ratione voluntas*," against the introduction of which maxim into our law, (which those who have been best acquainted with it, have entitled the perfection of reason) the country would, there can be no doubt, enter an eternal protest, and exclaim with the barons of old "NOLUMUS LEGES ANGLIAE MUTARI."

I thought it expedient to submit these observations to the reader, as my excuse for arresting his attention in the discussion of some subjects in the following tract, which, if the sanction of a few years can bear down that of ages, must be deemed law at this day, but which, in an essay of this nature, whose object is to develope principles, could not be passed over without investigation.

It behoves me likewise to mention one other circumstance, which is, that the reader will find many of the observations and general remarks, here submitted to his consideration, have been taken as well from the civil law writers, as from those who have discus-

fed the theory of the laws of nature and nations, to which I frequently reforted, knowing them to have been the sources, from which those great and distinguished characters, who laid the foundation of that noble superstructure, the system of equity, as now administered in this country, evidently received most essential assistance. But I did not deem it necessary to refer to the passages particularly, as they do not derive their authority in our law, from their being to be found in the Code, or the Digest, in Grotius, or in Puffendorfe, but from being recognized in our own courts.

With these remarks I shall leave the work to its fate, under a confidence that it will meet the same candid reception, with which the profession have honored the former productions of the author.

CAREY-STREET,
Lincoln's Inn Fields.

1790.

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INTRODUCTION.

THE HISTORY OF THE

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INTRODUCTION.

ON THE PRIMITIVE STATE OF PROPERTY.

MEN originally possessed all things in common. In this state every one converted whatever his occasions required to his own use. This injured no man, since there was then more than sufficient to answer the exigencies of all.

The exercise of this common right in a state of nature, stood in the place of that right of property which subsists in a civilized state; for no man could then *justly* take from another, that which another had first taken to himself. But if the first taker afterwards abandoned it, others might make use of it in their turn. But during the occupation of the first taker, he acquired a right, by virtue of which he was entitled to prevent others from interrupting him in the enjoyment of that, of which their *Creator had granted them the common use. This state is well illustrated by the simile of a theatre, which though open for every person that comes, yet the place in which any individual sits, is, in a proper and peculiar sense, his own; for the moment any place is filled, nobody has a right to remove the occupier for the purpose of seizing it for himself.

[* ii.]

Such was the condition of man with respect to land, while he continued in a pastoral state; for the individual was only entitled to the *possession* of the spot, which was in the immediate occupation of his herds and flocks. But necessity, and the sagacity of man, soon suggested, and opened to his view, the advantages that might be derived from the cultivation of the ground. When an individual had bestowed a portion of his labour on a particular spot, and thereby rendered it more productive than it was in a state of nature, the idea was easily adopted, that his right to that spot did not expire with every temporary dereliction of possession; he was entitled to the produce in the course of the seasons. This led to the division of the land. Then portions of it were in the first instance distributed among the nations of the earth, and afterwards by a

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progressive

ON THE PRIMITIVE STATE

[* iii.] progressive * subdivision assigned to tribes, families, and individuals.

To effectuate the still further advance of civilization, labour and industry were necessary ; which led to variety of inventions, by which the gifts of nature were made to contribute in a far greater degree to the conveniencies of life, than they were capable of doing in their primitively uncultivated state. Then the ancient community of goods was no longer consistent with that equity which in a state of nature required an equality of distribution. Things derived an accession of value from labor which they had not in their primitive state, and it was just that the produce of each man's industry should be so far his own, that no other should share the benefit of it, without his permission. New ideas of property then necessarily presented themselves to the mind, whereby every one, who possessed himself of things which he improved by his labor and industry, was considered as having thereby acquired a right to retain them as his own, although they were not necessary to his immediate use ; unless he disposed of them at his will and pleasure to others. This laid the foundation on which exclusive property in *moveable goods was established by civil laws, of which the characteristic is, that others are *always* excluded ; whereas in a communion of goods (i. e. in a state of nature) others are not excluded from things, of which any one is possessed, except *so long* as they are in the actual use of the present occupier. In an advanced state of society, this right of exclusive enjoyment is confirmed and modified in various ways, by laws made for that purpose.

[* iv.] Now as things which were the objects of property were of different natures, administering in different ways to the necessity and convenience of men, it happened that the individual had sometimes more things of one kind and fewer of another than his occasions required. He found it therefore convenient to exchange those things of which he had a superfluity, for those in which he was deficient. Hence originated traffic, which is a necessary consequence of property in goods, and reciprocal accommodation. But the commutation of commodities being, in the course of time, found inadequate to the various, and combined transactions to which society gave rise, it became necessary to agree on some common measure by which things, different

different *in their nature, might be compared together, and made equivalent to one another. To answer this end, men agreed to place an imaginary value on such permanent substances, as might become the standard of comparison between the different articles of property; and metals being found the most generally convenient for this purpose, they were adopted as the medium of exchange. Thus was money introduced, which has furnished private people with the means of extending their possessions; and rendered practicable that unequal division of property, which we now see prevail.

[*v.]

The discovery and adoption of this medium of value, money, enabling men to increase their possessions both of real and personal things in an extent not practicable before its introduction, and consequently enlarging the notion of possessing accumulated property, put an end, in a great measure, to the original mode of acquisition, by taking possession of that which belonged to no man, which act we have seen was the foundation of all individual property, and consequently, of all derivative acquisition.

*A thing may become ours, from a derivative acquisition, either by virtue of some act of another, or by virtue of some positive institution.

[*vi.]

The former of these modes of derivative acquisition will alone be material for our present consideration.

Derivative acquisition, by virtue of some act of another, is effected by contract.

A contract, according to the common law definition of it, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. But, by the writers upon general law, it is defined to be, "*Duorum pluriumve in idem placitum consensus, obligationis licite constituendæ vel tollendæ causa datus*;" that is, the consent of two or more persons in the same thing, given with the intention of constituting, or dissolving lawfully some obligation. Perhaps the following description will be deemed more simple than either. "A contract is a transaction in which each party

[* vii.]

party comes under an obligation to the * other, and each, reciprocally, acquires a right to what is promised by the other."

'It is evident that, under these definitions of a contract, every feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, promise, &c. may be included; for, in all these transactions, there is a mutual consent of the minds of the parties concerned in them, upon agreement between them, respecting some property or right that is the object of stipulation.

The ingredients requisite to form a contract are, First, Parties. Secondly, Consent. Thirdly, An obligation to be constituted or dissolved.'

That these things must coincide, is evident from the very nature and essence of a contract: for the regular effect of all contracts being on one side to acquire, and on the other to part with or alien some property, or to abridge and restrain natural liberty by binding the parties, or one of them, to do, or restraining them, or one of them, from doing, something which before he might have done, or omitted doing, at his pleasure, it is necessary *that the party to be bound, shall have given his free assent to what is imposed upon him.

[* viii.]

This mode of considering contracts is agreeable to the Roman law which says: "In omnibus rebus, quæ dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium; nam sive ea venditio, sive donatio, sive conductio, sive quælibet alia causa contrahendi fuit, nisi animus utriusque consentit, perducì ad effectum id quod inchoatur non potest." And no contract can be said to be strictly such, unless the party assenting be under an obligation to perform that, to which he has assented.

These observations lead us, First, to the consideration of what persons have a capacity to assent, so as to oblige themselves, or others, by agreement. And, secondly, what circumstances are necessary to conclude that the parties to a contract have assented, and thereby constituted a perfect obligation.

*OF THE ASSENT TO CONTRACTS OR AGREEMENTS AND THE POWER RESIDING IN DIFFERENT PERSONS, AS MORAL AGENTS, TO BIND THEMSELVES AND OTHERS.

[*9]

WE have already suggested, that it is of the *essence* of every contract or agreement, that the parties to be bound thereby should consent to whatever is stipulated ; for, otherwise, no obligation can be contracted, or concomitant right created. I shall, therefore, consider,

First ; What persons are capable of binding themselves by their contracts or agreements.

Secondly ; What persons are capable of binding themselves, and also others, by their contracts or agreements.

Thirdly ; In how many ways an assent to a contract or agreement may be given.

* And, fourthly ; What circumstances invalidate such assent.

[*10]

First. In order to ascertain what persons have a moral power to bind themselves by their contracts and agreements, we must consider what we mean by the term "Assent." Now the term "*assent*" signifies the acquiescence of the mind to something proposed or affirmed ; and involves, in consideration of law, first, a physical power of assenting ; secondly, a moral power ; and, thirdly, a deliberate and free use of those powers. Therefore the absence of any of these capacities in either of the parties to a contract or agreement, renders the person labouring under it incapable of entering into an agreement to bind himself, or, by virtue of his acts, others.

It is evident then, that a man who is not perfectly master of his reason, is incapable of giving a serious and valid assent to a contract or agreement thereby to bind *himself* ; because such assent is an act of the understanding, of which persons so circumstanced are morally incapable, their actions being the result of an *irresistible* impulse, the power of self-government being

[* 11]

ing wanting. In this respect, idiots * and lunatics are incapable of entering into contracts or agreements to bind *themselves* or their *own* property, the *essence* of a contract being, in such cases, wanting on their parts, their acts, if disadvantageous to themselves, not being to be imputed to them, but to their disease. It was therefore held in the Roman law, *quod furiosus nullum negotium gerere potest, quia non intelligit quod agit*. According to the law of England, also, all deeds, gifts, grants, and conveyances, not of record, made by persons of these descriptions, with a view to transfer their property, whether real or personal, are actually void; because such disabilities do not discharge or annul, but make the contract absolutely inoperative *ab initio*. And those cases, wherein it has been held that the deeds of such persons are not void, but voidable, proceed only upon the notion that *non est factum* cannot be pleaded to them, because they have the form, though not the operation of deeds, and, therefore, are not void (*that is*, as not being deeds) without shewing the special matter which makes them, notwithstanding their form, of no efficacy in fact. But the better opinion seems to be, that, as such an imbecility goes to the gist of the action, and proves the contract a nullity, it may be taken * advantage of on the general issue.— Thus it is laid down by *Ashton*, 39 H. 6. 42 b. that a warranty, entered into in a deed by one *non compos*, is *actually* void, because the deed is void.

So it was adjudged in the court of King's Bench, in the case of *Thompson* and *Leach*, that a surrender by a person *non compos* being actually void, a contingent remainder, depending upon the estate of the person *non compos*, was not destroyed by such surrender.

And where it appeared on a suit in chancery, instituted on behalf of a lunatic, that the defendant therein had conveyed lands to the lunatic, in consideration of which, the lunatic had assigned to him a security for money to satisfy him the purchase money; the court directed the defendant to account for the money, and to pay the same with damages.

But, although, in an abstract view, and considering the point merely in a moral light, and according to the nature of things, property cannot be acquired *originally* by one deprived of reason; because, in this method of acquiring property, the acquirer must be capable

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Instit. lib. 3.
tit. 20 de in-
tit. Stipul. 3.
Furiol.
4 Rep. 126.
Perk. sect. 21.
Finch. 102.
2 Roll Abr.
723.

4 Rep. 123.
Show. Par. Ca.
152.

[* 12]

Thompson v.
Leach, 3 Mod.
296—301.
S. C. Salk. 576.
L. Ray. 316.
3 Lev. 284.
2 Vent. 198.
Comb. 438, 463.
Carth. 211,
250. 435.
Attorney Gen.
v. Parkhurst,
1 Chan. Ca.
113.

Co. L. 2, b.
3 Bac. Abr. 84.
2 Vent. 203.

of a volition, or intention to take possession of, and hold such a thing as his own, which is the foundation of his right; yet, by the law of England, (which, in that respect, agrees with the law of most civilized states) persons labouring under insanity are considered as competent to acquire property from others by a derivative title; for, though, in this case likewise, to give effect to a transfer of property from one to another, it is required, in the common course of things, that the party receiving be capable of judging of, and assenting by proper signs to receive, what is transferred; yet, as the granting party is capable of assenting and thereby binding himself, the law is satisfied, *prima facie*, with the presumed assent to receive what it is intended will be beneficial, and adjudges this equivalent to a formal assent to accept, so far as such assent is necessary to give efficacy to a contract, and to vest the property transferred, in persons so circumstanced. And if such persons obtain or recover their intellects and agree thereto, such acceptance becomes binding; but if they die during their incapacity or recover their intellects, and die without agreement, their heirs may avoid such acceptance; for they shall not be bound by the contracts or agreements of *persons who, in fact, want capacity or power to contract.

[*13.]

[*14.]

However, notwithstanding the contracts and agreements of persons *non compos* to alien their property be void, and this even as to themselves; yet the better opinion is, that persons, so circumstanced, cannot, *themselves*, when they recover their intellects, take advantage of their own incapacity.

Those, who contend that a person *non compos* may, on his recovery, defend himself from his contracts by pleading his incapacity, found the proposition they maintain on the authority of the *Registrum brevium*, in which there is a writ for *the alienor himself to recover lands aliened by him during his insanity, dum fuit non compos mentis suæ, ut dicit, &c.*; on the authority of Britton, who states that insanity was a sufficient plea for a man to avoid his own bond; and on the reasoning used by Fitzherbert in his *Natura Brevium*, where he contends, "that it stands with reason that a man should shew how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time; and compares this case with that of an in-

Fol. 222.

C. 28. fol. 66.

Fol. 466.

fant

OF THE ASSENT TO CONTRACTS

[* 15.]

fant who *may avoid his feoffment, grant, or lease, as well within age as of full age." And further argues; "that the case of the *non compos* is stronger in law than the case of the infant, because the infant is considered in law, as *having a discretion* so as to subject him to be responsible for crimes, whereas the *non compos* hath *no manner of discretion*: for that if he kill a man, it is no felony; nor shall it subject him to any forfeiture."

Those who maintain the contrary proposition, rely upon the cases to be found in the year-books during the reign of Edward the Third, from which it appears to have been the opinion of the judges at that period, that no such plea was admissible; for in Mich. 5 E. 3 Pl. 131. *Herle* says, that such an issue in law, as that, at the time of the obligation made, the obligor was of *non-sane* memory, cannot be received; and 35 Aff. Pl. 10. of rent, on a release of the plaintiff pleaded in bar, to which he replied, that he was of *non-sane memory* at the time of making it; it is said per *Monbray*, you shall not have a writ of *dum non fuit compos mentis* of your own seisin, &c. nor, by consequence, such plea; and he said, that the judges, having been spoken to, were of the *same opinion: But the cause was adjourned, and no more is to be found respecting it. And, in the 29th. Hen. 6. on a question, whether the heir of one who had aliened when of *non-sane memory* could defeat the same by entry without action, *Prisot* lays it down as settled law, *that the ancestor himself could not have defeated his feoffment by action or entry*; because the law would not suffer him to disable himself: and he took a distinction between this case and the case of infancy of which the feoffor might himself take advantage; and upon the principle above mentioned, the whole court were clearly of opinion with *Prisot* as to the point we are now discussing. Accordingly, *Littleton* (who lived in the reigns of Henry the 6th, and Edward the 4th, and writ his book on Tenures in the 14th year of the latter prince's reign) stating (sect. 405) the right of the heir of a man of *non-sane* memory to enter into the lands of his ancestor notwithstanding a descent cast, uses the following strong language as to the point in question. "And in this you may see a case where the heir may enter, and yet his ancestor, which had the same title, could not enter. For he which was out of his memory at the time of such descent, if he will enter after such a descent, if

[* 16.]

OR AGREEMENTS.

an action upon this be sued against him, he hath nothing to plead for himself or to help him, but to say, that he was not of *sane memory* at the time of such descent, &c. And he shall not be received to say this, for that no man of full age shall be received in any plea by the law TO DISABLE HIS OWN PERSON, but the heir may well disable the person of his ancestor for his own advantage in such case; for that no laches may be adjudged in him which hath no discretion in such case." And (section 406) he proceeds thus: "and if such a man of *non-sane* memory make a feoffment, &c. he himself cannot enter, nor have a writ *dum non fuit compos mentis*, &c. *causa qua supra*; but after his death, his heir may well enter, or have this writ, at his choice."

This conclusion of *Littleton*, in which he is supported by Lord *Coke* (after an examination of all the authorities, and all the elementary writers before his time) is further corroborated by several decisions reported in *Croke Elizabeth*, which, from their having been decided so near the period in which *Fitzherbert* wrote his *Natura Brevium* (which was in the time of Henry the 8th) furnish a strong ground to doubt, whether this rule was not, at that time, settled, notwithstanding *Fitzherbert* reasons strongly against it.

The first case, I allude to; is that of *Stroud and Marshal*, where debt was brought upon an obligation, and the defendant pleaded, that, at the time of the obligation made, he was *de non-sane memory*; and it was, on demurrer, adjudged to be no plea.

And in the case of *Cross and Andrews* (in the same reporter, during the same reign) in which an action upon the case was brought against an innkeeper, wherein the plaintiff declared on the common custom of the realm, that an innkeeper should keep the goods of his guests safely; the defendant pleaded, that when the plaintiff lodged with him, he was sick and of *non-sane memory*, by occasion of his indisposition; and this plea, on demurrer, was held bad. And one reason given was, that it did not lie with an innkeeper to say, he was of *non-sane memory* on this action, any more than in debt on an obligation.

To these authorities may be added *Beverley's case*, wherein it is stated, that two points, upon argument,

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[* 17.]

[* 18.]

Stroud v. Marshal, Cro. Eliz. 398.

Cross v. Andrews, Cro. Eliz. 622. S. C. 1 Roll Abr. 2, D. 2.

Beverley's case 4 Rep. 123.

OF THE ASSENT TO CONTRACTS

[* 19.] and on good consideration, *were unanimously resolved *per totam curiam*, 1st. That every deed, scoffment, or grant which any man *non compos* makes, is avoidable and yet shall not be avoided by himself; because it is a maxim in law, that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. 2d. If the common law had given a writ of *non compos mentis* to him who has recovered his memory after alienation, certainly it would have given him remedy for the maintenance of himself, his wife, children and family, although he recovered not his memory, but continued *non compos mentis*.

However, notwithstanding the weight of the authorities I have cited, it might be contended, if the reason of a thing were of that side the question, that the writ in the *Registrum Brevium* evinces, that the ancient common law recognized this kind of plea by the party *non compos* himself, and that the cases, however numerous, being founded on a mistaken notion, are not of sufficient weight to counteract the evidence of such a plea being legal, afforded by the insertion of such a writ in that valuable repository. But upon a fair

[* 20.] *investigation of the question, it appears to me, that, according to the spirit of the common law, the strongest arguments will be found against receiving such a plea. *Fitzherbert*, who contends most strongly in favor of its admission, founds his argument, in defence of that proposition, principally on the analogy between the case of insanity and the cases of infancy and duress: but there seems to be a wide difference in the nature of the disqualifications; for infancy and duress are facts capable of being proved without having recourse to the actions of the parties meant to be disqualified. They cannot be assumed where they do not really exist. But insanity, being a quality annexed to the mind of the party who is subject to it, is a conclusion upon his state of mind to be drawn only from his own actions. A person therefore may assume this disability, whereas he cannot feign the other, the proof not originating in himself and his actions, but subsisting independently. That being the case, the law (which is anxious to provide against the possibility of committing fraud, at the same time that it provides for the protection of right) removes the temptation to practise the former, by prohibiting every man from setting aside his own deliberate

deliberate acts by *stultifying himself, although it [* 21] furnishes a means by which his heirs after his death, or his friends whilst he is living, may avail themselves of this disability. And it is to be observed, that the law in these cases does not proceed upon the ground that the party is bound ; for that cannot be, seeing that, by the law of nature, he wants the capacity to assent to a contract ; but because the policy of the law, which rather submits to a particular mischief than a public inconvenience, sets bounds to the law of nature in point of form and circumstance.

For similar reasons of public policy, all acts done by idiots and lunatics in a court of record, as fines, recoveries, and the uses declared upon them, recognizances, statutes, and the like, are good, and neither they themselves, nor their heirs, nor their executors can avoid them, 4 Rep. 124. 2.
And. 145. 193.
Co, Lit. 247.
2 Inst. 483.
Bro. tit. Fines 75
10 Rep. 42 b.
Bro. fait inrol.
14.

The law, in some instances, proceeds upon the same principle with regard to infancy and dures ; for if an infant levy a fine, suffer a recovery, or enter into a security of record, and omit to avoid them before he come of age ; or if a feme covert levy a fine ; the former cannot avoid such assurances and securities on *the ground of infancy, nor the latter such fine on the ground of dures, [* 22.]

But mark the reason of all these exceptions : it is not because the law binds persons, who by defects or disabilities are either by the law of nature or the law of the land, disabled to contract, but directly the contrary ; it is, because the law finds them to be persons not so disabled, and does not admit the averment of such disablement, because, in the one case, it is certified by the invincible and indisputable credit of the judge (which is the highest evidence the law knows of) that the *non compos*, or the infant is a perfect and able person, and because, in the other case, the wife is examined of her free will judicially by an authentional person, trusted by the law, and by the king's writ for that purpose, and so taken in some sort as a sole woman. And, therefore, the authority of the record is not to be contested, nor is it to be avoided by any averment against the truth of it : for that would tend to lessen the credit of judgments in courts of record, by trying them by other rules than themselves. So that the same law of policy, which prohibits a person *non compos* from stultifying himself upon grounds of public convenience,

[* 23.] *convenience, likewise, upon similar grounds, prohibits an infant, or feme covert, from taking advantage of infancy or coverture, when to permit such plea would be attended with public inconvenience.

Then, if the ground of general inconvenience be a sufficient reason in our law for admitting a mischief in particular, to prevent a public inconvenience, by holding not only such persons, but also their heirs and executors, to their contracts if of record, and refusing to admit all averments in such cases of these disabilities *in perpetuum*: surely there is nothing ridiculous in the common law having adopted the maxim, that a man should not avail himself during his life of his own folly or insanity; because the admission of such an allegation would, as we have mentioned, open a gate to dissimulation, deceit, and fraud.

But although, at present, the law seems clearly to be, *that a man shall not stultify himself* by his own plea, yet it has provided means whereby the acts of lunatics may be rendered ineffectual, even in respect of themselves. For, though the law of England has not provided for persons so circumstanced a tutor, as the *civil law has done, without whose assent no act of theirs is binding, yet it has established a curator, who may protect and secure their lands and goods: and to that intent the common law has given the custody of idiots, madmen, and lunatics, and of all that they have to the king, who is bound of right, by law, to defend his subjects, their goods and chattels, lands and tenements: which prerogative is declared by the statute of the 17 E. 2. cap. 9 and 10 *de prerogativa regis*, which (as is expressly stated therein as to lunatics) also expressly enacts, that the king shall provide that their lands and tenements shall be safely kept, &c. "*So that they shall in no wise be aliened*" within the time aforesaid (i. e.) during the suspension of their understanding.

Upon these statutes it is holden, that, after office found upon the writs *de idiota inquirendæ*, or *de lunatico inquirendo*, the alienation, gift, or other act, &c. of him who is *non compos mentis*, as well as of him who is an idiot, may be avoided, even during his life, in a *scire facias* by the king, who is bound as *pater patriæ* to protect all his subjects, their goods and estates; and which office, to prevent all incumbrances, shall have

v Chan. Ca.
352.

Jenk. Cent. 40.
Pl. 77. 4. Rep.
326. b.

Fitzh. Abr. tit.
sci. fa. Pl. 10.
206. 1 Chan.
Ca. 112.

have relation to the *disability. For the reason why they cannot be avoided by himself on plea, &c. is not for default of right, but by reason of a personal incapacity to do the act, namely, to stultify himself by his plea. And that rule is not impeached by this process; because the idiot or lunatic is no party to the record, for the whole truth is found by the inquest.

[* 25]

And, after such office found, all gifts made by an idiot, lunatic, &c. of his goods and chattels, and all bonds made by him are *utterly* void; and if he be sued in any action upon any bond or writing that he has made, the king, by his writ (so long as the office stands in force) reciting the office, may send a *superse-deas* to the justices, where the suit is commenced.

4 Rep. 126, b.

Upon these common law proceedings, the interposition of the chancellor, to avoid the acts of idiots and lunatics, seems to have been founded. For his authority in these cases does not originate in the extraordinary jurisdiction of the court, or in the authority of the chancellor or keeper, *qua such*; but it is by virtue of a peculiar jurisdiction of the great seal, granted under the royal sign manual upon every *demise of the crown to the then lord chancellor or lord keeper, authorizing them, respectively, to make grants and orders for the custody of lunatics and their estates, and to act therein as they shall think fit, and by virtue of the prerogative of the crown.

3 Atk. 170.
3 P Will. 105.
111. 2 P. Will.
118.

[* 26]

Upon this ground, bills brought to set aside conveyances, settlements, and assignments, made by idiots and lunatics (though in other respects reasonable, and for the convenience of their families *) have been retained; for such bills ought properly to be brought by the attorney general or committee, and the lunatic ought not to be a party; because, if they were considered as brought by the lunatic, and founded upon the extraordinary jurisdiction of the chancellor over the conscience of the party contracting, as having taken an undue advantage of the other contracting party, the same objection would lie in chancery to his stultifying himself as lies at law to that plea. Accordingly it was said by the lord chancellor and justice *Dodderidge*, that if a man who is *non compos mentis* alien's lands, *they shall not be restored to himself in chancery, upon a matter of equity, against the maxim of the common law.* And in

2 Vern. 414.
Att. Gen. vers.
Parkhurst, 1
Chan. Ca. 112.
* 1 Eq. Ca.
Abr. 279.5.
2. Ver. 412.
Att. Gen. vers.
Parkhurst,
1 Chan. Ca.
112. et vid,
Ibid. 153, 154.
2 Vern. 412,
678.

Vide 1 Eq. Ca.,
Abr. 278 Pl. 1.
1 Roll. Ab.
377, Pl. 11.

the

[*27]
 1 Chan. Ca.
 13. S. L.
 1 Chan. Ca.
 153, 154.

the case of the attorney * general and Sir *Robert Parkhurst*, which was a bill filed to set aside an assignment made by a lunatic long before inquisition, but after the time he was found lunatic, it was objected that the lunatic was not made a party, and the objection was overruled, the reason for which was, that he might not stultify himself.

But it seems that it is not a fatal objection to a bill for the purpose of avoiding an act of a lunatic, &c. that he is a party with the attorney general or his committee; the latter of whom seems, to some purposes, to be the representative of the crown, and to stand in the place of the attorney general, and not to represent the lunatic.

Ridler ver.
 Ridler, 1 Eq.
 Ca. Abr. 279.5.

Thus where a bill was brought by a lunatic and his committee to set aside a settlement, which had been obtained from him by the defendant, before the issuing out of the commission of lunacy, but subsequent to the time wherein, by the commission, he was found to have been a lunatic, the defendants demurred; for that it was a known maxim of law, *that a person should not be admitted to stultify himself*. The lord chancellor overruled the demurrer; and alledged, as one reason for so * doing, that the committee was likewise a plaintiff, and the several charges of lunacy were by him, in behalf of the lunatic; and his lordship said, that it had been always held that the defendant must answer in that case, and he was ordered to do so.

[*28]

But where a suit is on behalf of the lunatic, and in order to compel the performance of an agreement made with him before he became insane, and is not to set aside an agreement made by him, the lunatic ought to be a party; because he may recover his understanding, and then he is to have his estate at his own disposal, and his committee is but a bailiff with regard to him, and accountable to him or his representatives; in which respect his case differs from that of an idiot, for his recovery is not expected by the law.

Att. Gen. ver.
 Woolrich, 1
 Chan. Ca. 153.

Thus where a bill was brought by the attorney general, on behalf of a lunatic, to be relieved upon a marriage agreement for the benefit of the lunatic *before he was such*, and the defendant demurred, because the lunatic was no party; it was ruled a good demurrer; the lord keeper declaring, that it was as needful

to make the lunatic a party as an infant, *where a suit was on his behalf; for in such case, his being a party does not tend to stultify himself.

[* 29.]

If, in such cases, it be a question whether the transactions impeached, as being done when the party was *non compos*, were done when he was in a state of insanity or at a lucid interval, or whether he had lucid intervals or not; the court of chancery will direct an issue to try those facts. But a person *non compos* at times only, may bind himself by an agreement made in his lucid intervals.

2 Vern. 412.
414.

Drunkenness, though operating during its continuance as a temporary insanity, yet being of a man's own procuring, is not, in law, of itself a ground for a man to rescind his assent to a contract or agreement, whether the same respect his lands or goods, or other things concerning him. Nor is it a reason, in equity, for relieving a man against any contract or agreement, gained from him when in those circumstances.

per Sir Jos. Jekyl, in John. son v. Medlicott, 3 P. Will. 131, note A.

Upon this principle Lord *Hardwicke* thought that, where an agreement was to settle disputes in a family, and was reasonable, the *objection that one of the parties was drunk at the time, was not sufficient ground to set it aside, unless some unfair advantage had been taken.

Cory v. Cory,
1 Vcz. 19.

[* 30.]

But if the party from whom such contract or agreement has been gained, were drawn in to such a debauch by the management or contrivance of him who gained the contract or agreement, and was in such a state as to be utterly deprived of the use of his reason and understanding, then equity would relieve; for such an assent can by no means be esteemed serious or deliberate, and without this no contract may be binding in equity.

Nor is a person's being of a weak understanding of itself any objection, in law, to his binding himself by his assent to a contract; for neither courts of law nor equity examine into the wisdom or prudence of men in their manner of transacting their concerns, or disposing of their estates. If a man, therefore, be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands for a reason for his actions. And the rule is the same in equity; for if a weak man give a bond, and there be no fraud

Osmond v. Fitzroy, et al.
3 P. Will. 129.

or

[*31]

or breach* of trust in the obtaining it; equity will not set it aside only for the weakness of the obligor; if he be *compos mentis*: for the court of chancery will not measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity; where there is a legal capacity.

Osmond v.
Fitzroy, et al.
3 P.
Will. 129.

But if there be any fraud in procuring a bond from a weak man, or the transaction be attended with circumstances that warrant a suspicion that the party, binding himself; has been practised upon by imposition; then a court of equity will furnish relief. Therefore, where the parents of a young nobleman, had intrusted a servant to take care of an infant heir on his travels, and to prevent his being imposed upon; and the servant, continuing with him until he was twenty-seven years of age, had then prevailed upon him to enter into a bond to pay him a thousand pounds, which bond was prepared by the servant himself and kept a profound secret: Sir *Joseph Jekyl* relieved on the ground of fraud; and decreed the bond to be delivered up; saying, that the servant, instead of acting agreeable to his trust, had, himself, been guilty of imposition; and that a breach of trust was of itself evidence of fraud, nay of the greatest fraud; because a man, however careful otherwise, was apt to be off his guard, when dealing with one in whom he reposed a confidence.

[*32]

Upon the same principle, if a man were of a weak understanding, and were harrassed or rendered uneasy at the time of contracting; or if a deed were executed *in extremis*; or by a paralytic, whose mind could not be supposed to be adequate to the business he was about, and who might therefore be easily imposed upon; this might, if the provision in the deed were something extraordinary, or the conveyance made without any consideration, or one remarkably inadequate, be relieved in equity.

Cro. Car. 502.

An infant is under an incapacity to grant or convey, by deed, any part of his property; the case of a lunatic, and that of an infant, going, in general, as has been said, hand and hand in this respect; both being governed by the same reason, *viz.* want of power or capacity to assent to any alienation; therefore a grant, surrender, or conveyance made by an infant of his estate, by deed or matter in fact, is absolutely void; and although some have endeavoured to distinguish between

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tween a deed, *which gives only an authority to do a thing, and a deed which conveys an interest by the delivery of the deed itself, viz. that the first is void and the other voidable; yet the better opinion is, that the reason is the same to make them both void, unless it be in the case of a feoffment, which is only voidable because of the solemnity of the conveyance.

But conveyances by act of law are void or not as against an infant, according to their effect; for the disability of an infant (analogous to that of one *non compos*) to assent to an act *in pais*, is only *quo ad hoc*, and *ex parte*: that is, it is only a disability to bind himself, and not such a disability in him as discharges others. The validity therefore of such acts depends upon, whether there be an apparent benefit, or the semblance of a benefit, to the infant. If neither of these appear upon the face of the transaction, it is merely void; otherwise voidable or not, at the election of the infant. And, therefore, although the surrender of an infant lessee by deed is void, his surrender in law, by acceptance of a new lease, will be void or not, according to the terms of such new lease. If it either increase his term or decrease his rent, it will be good, but if *neither of these be effected by it, it will be void.

It is observable, that this incapacity of an infant is of a mixed nature, partly physical and partly moral, proceeding frequently from the want of legal, not of natural, discretion; for, in deciding upon the contracts of infants, the actual state of their capacities, or their physical power to decide rationally, is not considered, it being sufficient that they want discretion in presumption of law, which every person does (without reference to his actual ability or judgment) until he arrives at his age of twenty-one years; except in cases of actual necessity, in which cases, the disability to consent so as to bind *himself* (as far as it operates as a moral incapacity) being intended as a privilege and to protect persons of tender years from imposition, yields in the degree, in which its influence would counteract its object.

Upon this principle an infant is bound, at law, by his contract or bargain for diet, apparel, necessary learning, employment, and the like: and the court of King's bench were of opinion, in the case of *Freeman and Hurst*, that a promissory note, given by an infant

[* 33:]

Cro. Car. 502.

[* 34:]

Cro. Jac. 494.

1 Term Rep.
41.

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[*35.]

for * board and lodging, and for teaching him the business of hair-dressing, was valid, and would support an action for the money.

Vide Cro. Ja.
320 Bro. tit. cov-
erture et infant,
Pl. 25. Kirton
v. Eliot, 2. Bullst.
69.

So if an infant take a lease of an house or of land, and reside in the house, or enter upon the land and manure it until a rent day; if the rent be not of greater value than the lease, he will be liable to an action of debt for the rent.

Fitzh. Nat.
Brev. quart.
edit. 390. 21 H.
6. 31. b. 9 H.
6. 10. Bro.
tit. Labourers;
43. 51 tit. Co-
vert, 25.

And an infant of twelve years old may bind himself by a covenant to serve in husbandry; and if he depart from his service, an action will lie against him, founded on the statute of labourers, 25 E. 3. stat. 1.

So a single obligation, entered into by an infant, for a sum *actually* laid out in necessaries, will bind him.

Cro. Eliz. 920.
1 Lev. 87.
March 145.
1 Roll Abr. 729.
Pl. 8.
3 Burr. 1719.

And an infant may, even at law, be bound by a presumed agreement; for it was said by Yates, Justice, that an action of assumpsit for a fine, due by an infant on an admittance to a copyhold, would lie, if the infant continued to occupy and enjoy.

[*36.]

* But, at law, the legal capacity of an infant to bind himself by his assent to a contract, does not extend beyond the necessity that gives rise to it; namely, his education, necessaries, and lodging. Therefore if an infant be in trade, and incur a debt in buying things to maintain his trade, it will not bind him, although he gain his living thereby.

Whittingham
vers. Hill. Cro.
Ja. 494.

3 Salk. 196.

And the rule of law is the same, as to a debt incurred in repairing houses belonging to him, or the like.

Freeman v.
Hurst, 1 Term
Rep. 40. Bart-
lett v. Emery,
ibid. 42. (note
2.)

Neither can an infant bind himself by stating an account; because the only consideration for the promise that arises in law upon a stated account, is the stating of the account. Therefore, as an infant cannot state an account, the consideration does not hold, and the promise is void.

Farnham v.
Atkins, 1 Keb.
446.

So where a woman covenanted to teach an infant to sing and to dance, and to find him in meat, drink, washing and lodging, and the infant covenanted to serve her: it was held that the infant was not bound by the covenant.

But

O R A G R E E M E N T S .

* But an infant's bond, even for money borrowed, may, by circumstances *ex post facto*, become binding in equity.

[* 37.]

Thus where an infant borrowed a sum of money for which he gave a bond, and then devised his personal estate (being of sufficient capacity) for the payment of his debts particularly those he had set his hand to; this bond was decreed to be paid notwithstanding the minority of the obligor.

Hampson v.
Lady Syden-
ham, Nel's
Chan. Rep. 55.

And although, at law, a contract entered into with an infant for money, even to pay for necessaries, be void according to the resolution in *Salkeld*, yet it is otherwise in equity; for if one lend money to an infant to pay a debt for *necessaries*, and, in consequence thereof, the infant does pay the debt: although he be not liable at law, he will, notwithstanding, be so in equity; because in this case the lender of the money stands in the place of the person paid, *viz.* the creditor for necessaries, and shall recover in equity as the other should have done at law.

Salk. 279.

And although an infant cannot by his assent bind himself to a specific contract, except *in cases of the nature of those above stated, yet his incapacity does not render contracts entered into with him, if there be any semblance of benefit to arise to him thereby, void, or voidable by the party contracting with him; for though the infant has this privilege, yet the party with whom he contracts has it not; for the latter knows with whom he contracts, and, therefore, shall not be relieved against his own folly; nor shall that be turned to the prejudice of the infant, which the law designed as a protection and security to him against all disadvantageous contracts.

Note. This ob-
[* 38.]
servation ap-
pears to be
equally applic-
able to a contract
with an idiot or
madman.
For, as to the
other contract-
ing party the as-
sent is perfect.

Therefore, where the plaintiff declared that the defendant (in consideration that the defendant would suffer him to take away so much of the plaintiff's grass which the defendant had cut down) promised to pay him so much for it; it was moved in arrest of judgment, after verdict, that the plaintiff was an infant, and, therefore, that he not being bound by the agreement, neither ought the defendant to be bound by it; for the consideration was not good, because not reciprocal; for the infant might have avoided his promise, if an action had been brought against him. *Sed non allocatur.*

Smith v. Bow-
en, 1 Mod. 25.
S.C. 1 Vent. 51 et
vid. Farneham
v. Atkins, 1
Sid. 446. For-
ester's case,
Sid. 41.

So

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[* 39.]
Holt v. Claren-
cieux, Strange
937.

* So it was held in the case of *Holt and Clarendieux*, wherein the plaintiff declared that it was mutually agreed between her and the defendant, that they should marry at a future day which was past ; and that, in consideration of each other's promises, each engaged to the other ; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she laid to her damage of 4000*l*. The defendant pleaded that the plaintiff at the time of the promise was an infant. And it was contended, on the behalf of the defendant, that the plaintiff not being bound equally with the defendant, this was a *nudum pactum*, and that therefore the defendant could not be charged in the action. But the court were of opinion, that as marriage was then looked upon to be an advantageous contract the agreement was not void, but voidable at the election of the infant ; and that as to the person of full age, it was absolutely binding.

* And equity will decree a specific performance of an agreement so circumstanced against the adult.

Slayton v. Ash-
down, 9 Vin.
[* 40.]
Ab. 393. Pl. 4.

Thus where A. during his minority, by himself and guardian, entered into articles to let B. a farm at a certain rent ; B. entered upon * the farm and continued the possession, and paid the rent after A. came of full age. Then A. conveyed the inheritance to C. and afterwards B. quitted the farm, insisting that he was only tenant at will, and refused to accept a lease or execute a counterpart, because A. being an infant at the time of making the agreement, was not bound by it, and therefore B. ought not to be bound by it. But by *Harcourt Chan.* B. shall execute a lease to C. and C. execute a counterpart of such lease to him in pursuance of the articles, and B. shall pay costs.

Cre. Car. 303.
305.

If an infant make a lease for years reserving rent, and a lessee enter ; he may make the lessee his tenant, or, at his election, a disseisor, and proceed against him accordingly.

And the court of Chancery, which in these cases acts upon principles of substantial justice and natural equity, on whom the custody of infants officially devolves, has frequently interposed, and held infants to their contracts in cases where, at law, they would not have been bound. The principle, upon which that court proceeds, seems to be this : that, as, on the one hand, if advantageous contracts were not binding

* binding upon persons contracting with infants, the protection which was intended as a privilege, would, in event become a prejudice; so, on the other hand, if no agreements would bind infants either in law or in equity, that privilege, at the same time that it protected them from prejudice, would debar them from the possibility of reaping any advantage by contracts, as none would treat with those whom they knew could not be bound. Equity, therefore, considers the intrinsic nature of the contract, with what view it is entered into, who are the parties to it, whether the friends of the infant advise and consent to it, the extent of its influence, and in what degree it has been executed, and directs the conscience of the infant according as these circumstances affect the agreement; thereby giving to such transactions their just efficacy.

[* 41.]

Vide 9 Mod.
104.

Thus a contract made by an infant, by the advice and consent of his friends, has been decreed to be good, and that under the most harsh circumstances imaginable; namely, by turning the interest of money into principal, upon condition that the creditor would not, at that time, extend the lands of the debtor. As where J. S. mortgaged his estate to C. and then * died leaving D. his daughter and heir, who was an infant and had nothing to subsist on but the rents of the mortgaged estate. The mortgage having been suffered to run in arrear three years and a half, C. grew uneasy at it, and threatened to enter on the estate unless his interest might be made principal. Upon which D's mother, with the privity of her nearest relations, stated the account, and D. being then near of age, signed it. This agreement was established by the court of Chancery, being for the infant's benefit, who, without it, would have been destitute of subsistence.

[* 42.]

Earl of Chesterfield v. Lady Cromwell,
1 Eq. Ca. Abr.
287. 1.

From these considerations that head of equity, which, in cases of marriage contracts and agreements, authorises the court to restrain infants (parties thereto) from rescinding, by decreeing such agreements to be binding on their property, seems to have sprung.

For it is obvious, on reflection, that marriage agreements for the settlement of the property of the parties are not original, but are in the nature of accessory contracts. The principal contract is the marriage itself, which male infants at fourteen, and female infants at twelve, are of capacity to enter into with
consent

[* 43.]

*consent of their parents or guardians. As soon as the marriage is had, the principal contract is executed and cannot be set aside, or rescinded even at law ; so that it is then considered upon the same footing as contracts binding on the ground of necessity. The estate and capacities of the parties are immediately altered, The children born of the marriage are equally purchasers under both father and mother. So that were the parties permitted to rescind such contracts, the interest of third persons, the issue, would be affected ; for such agreements must be either good or bad *in toto*, because every part constitutes the whole, as the consideration arises from each part ; and, consequently, it is impossible to take away any part of the consideration, without overturning the agreement entirely.

Then, as the law has entrusted the parents and guardians of infants with the direction of the principal contract, the marriage of their children and wards, and considers the children when acting under that sanction, as bound by their assent in like manner as in other contracts arising out of necessity ; it seems perfectly consistent with the principles * of equity and justice that they should be bound, acting under the same sanction, by their assent to the accessory contract respecting their property. And the interest of the issue in, and alteration in the capacities of the parties to such contracts, furnish an equitable ground for the interposition of the courts. And indeed, if equity did not enforce such agreements, this privilege of not being generally bound to the execution of contracts, meant to protect infants, would militate in cases where the infant's fortune was in money the other way ; for the primary contract being binding, must be followed by its legal consequences, one of which would be, that the husband, money being a personal thing, would be entitled to the absolute property in it immediately upon the marriage.

[* 44.]

The first case that occurs of this kind is that of *Price and Seys*. There a lady, entitled to a portion of 3000*l.* payable at her age of twenty-one, and likewise entitled to a bond of 100*l.* both of which were made chargeable upon a real estate, and entered into a treaty of marriage, the lady being at that time but eighteen years of age. Upon this occasion marriage articles were made,

Price v. Seys,
Barnard. 117.
S. L. per Lord
Hardw. 3 Atk.
613.

[* 45.]

made, by which, in * consideration of the intended marriage, and of the 3000*l.* portion and of the 100*l.* bond, the intended husband agreed to make a settlement upon her, the uses of which should be to the husband and wife for their lives, and the life of the survivor of them, by way of jointure upon her, and in bar of her dower, the remainder to the heirs of the body of the wife by the husband begotten, &c. The marriage was solemnized, and then the husband died, without having made a settlement, the wife surviving. She afterwards married again, and then she and her husband set up a claim to these sums in her right as surviving her husband. On a bill filed between the parties in Chancery, the question came before Lord *Talbot*, who was of opinion, that there was no ground for the claim. His lordship said it was clear, that if a settlement had been made in this case, instead of the articles, the court would not have suffered the wife to claim the benefit of the demands in question, notwithstanding she had survived her husband; for the husband would have been considered as a purchaser of her portion. That in this case there was no settlement made, but only articles. Then the question was, whether that would make any difference? And his * lordship's opinion was, that it would not. For it was reasonable that these articles should bar the wife of the benefit of these choses in action, in the same manner as a settlement itself would have done.

[* 46.]

And it would make no difference, in such case, whether the interest of the wife were in possession, or depended upon a contingency. The case of *Theobald* and *Duffay*, determined finally in the house of Lords, is a very strong case to this purpose. So is the case of *Harvey* and *Ashley*, wherein an objection was made, that, as part of the fortune of the wife (who was an infant, was a contingent personal interest, which by the marriage would not have been transferred to the husband, the settlement of that could not be beneficial to the infant, and was therefore remediless: but Lord *Hardwicke* disallowed that distinction.

Theobald v. Duffay, 9 Mod., 101. 1 P. Will. 574, 2 Eq. Cas. Abr. 88. c. 117 vide inf.

3 Atk. 606.

And in the case of *Blois* and *Lady Hereford*, this principle was carried still further, an infant being there considered as bound, as to her personal estate, by her agreement, *inferred* from circumstances only. In that case A. married with B. who had an estate in land and a fortune

Blois v. Lady Hereford. 2 Vern. 501.

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[*47.] a * fortune in money. Being both infants, an act of parliament was obtained for settling a jointure on the wife in bar of dower, but to cease if she did not settle her land when of age; but nothing was said as to the wife's personal estate, part of which was a mortgage for 1300 *l.* taken in a trustee's name. The wife when she came of age settled her own land. Afterwards the husband died. The question was, whether this money should go to his executors, or survive to the wife as a chose in action? and Lord *Cowper* (then lord keeper) said, that he laid no stress upon the declaration of trust. *The law of the court would presume a promise*; and in all cases where a settlement was equivalent, it was to be intended that the husband should have the portion. The wife should not have her jointure and fortune both.

But these cases must be taken with some distinctions. For if, in such case, the jointure were inadequate to the wife's portion, much more if there were any collusion between the wife's friends and the husband in the making of the jointure, so as by that means it was not suitable to the lady's fortune; there, if the portion consisted in choses in action, unaltered during the marriage, as she would be entitled * to her legal interest in these choses in action by surviving her husband, a court of equity would not, in such case, take from her the benefit of them; and in that case she would have an equity, rebutting the equity which the representative of the husband would have upon her.

In the case of *Cannel and Buckle*, Lord *Macclesfield* said, that if a feme infant seized in fee should, on a marriage, with the consent of her guardians, covenant, in consideration of a settlement, to convey her inheritance to her husband, and it were done in consideration of a *competent* settlement, equity would execute the agreement.

And although Lord *Hardwicke* observed, in the case of *Harvey and Ashley*, that this was going a great way, as it related to the inheritance of the wife; yet he admitted that there were cases where the court would go to that extent. For instance, if lands of the wife were no more than an adequate consideration for the settlement that the husband made, and after the marriage the wife should die and leave issue, who would be entitled to portions provided for them by the settlement,

Vide 2 P. Will.
243.

3 Atk. 615.

Vide infra, Cecil
v. Salisbury.
Bishop of Bath
and Wells v.
Hypfley.

OR AGREEMENTS.

ment, it would* in that case be very reasonable for the court to affirm that settlement.

[* 49.]

But in the case of *Durnford* and *Lane*, which was a bill praying a specific execution of articles, made previous to the marriage of *Thomas Lane* with *Ann Bowyer*, then an infant, entered into for the settlement of her estates, by which it was covenanted that, upon her attaining her age of twenty-one, the husband and wife, and her mother, should levy fines, and settle the estate in trustees to the use of the mother for life, remainder to the trustees to pay the rents, &c. to the wife for her separate use during her coverture—remainder to the husband for life, remainder to the children of the marriage, in such proportions as the wife should appoint, in default of appointment, share and share alike in tail general—remainder to such uses as the wife should appoint; and in failure of appointment, part to her and part to the mother in fee; and whereby the husband covenanted to permit the wife to enjoy the estates to her separate use, and that he would lay out 500*l.* and 1500*l.* to certain uses declared by the settlement: *L. Thurlow* seems to have been of opinion, that an infant would not be bound by articles made* previous to her marriage respecting her real estate, unless she had a settlement from her husband, and had, after his death, taken possession and availed herself of it; in which case his lordship thought she would be bound by the equity arising from her own act. Upon which ground he declared, in this case, that he could not say the whole property of the wife was bound, or decree the articles to be specifically performed.

Durnford
v *Lane*,
1 *Brown's Cas.*
Chan. 116.

[* 50.]

But it is observable, that, in the preceding case, the general object of the settlement was the *fortune* of the wife *only*, and that the court was able to give relief without actually deciding the question, as to the validity of such contract by an infant.

And Lord *Thurlow*, in the case of *Williams* and *Williams*, was of opinion, that a marriage contract, the effect of which was to preclude an infant from any thing, whether real or personal, which should come from *any* quarter, would be void, as unreasonable.

Williams v.
Williams.
1 *Brown's Cas.*
Chan. 153.

But, in such cases, the husband will be bound by his covenant, respecting the estate of his wife which

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shall

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[* 51.]

Williams v.
Williams.
3 Brown's C.
Chan. 152.

shall afterwards come to * him, as well as respecting the estate of which she is in possession.

Thus where by indentures, previous to the marriage of A. with B. an infant, it was agreed, that 700 *l.* advanced by B. and 700 *l.* advanced by her uncle, should be laid out in lands, which should be settled upon her for life, with remainder to trustees, upon trusts therein mentioned ; with a proviso in the deed, by which A. covenanted, that all sums of money, &c. which should come to B. or to him, in her right, from the mother, or *otherwise*, should be applied to or vested in trustees to the same uses as the 1400 *l.* A chose in action belonging to the wife, was reduced into possession by A. and a moiety of the residuary estate of the mother of B. devolved upon A. And Lord *Thurlow* held, that the husband having covenanted for himself that what should come to him should be bound by the articles (which he might do) the chose in action must be so applied, and also the moiety of the residuary estate of the mother.

[* 52.]

Strickland v.
Coker, 2 Chan.
Ca. 211.

And a wife is also entitled to the interposition of the court of Chancery, to enforce an agreement made on her marriage with an * infant, if her portion be an adequate consideration for the settlement stipulated.

Thus where the defendant was seized for lives of a church lease, in trust for an infant to whom he was guardian ; and on a treaty of marriage between the infant and the plaintiff, who had 1000 *l.* portion, an indenture was made, with the consent of the guardian, whereby the infant covenanted that the lease should be surrendered, and a new lease taken, in which the life of the intended wife should be put in for her jointure. The guardian was made party to the deed only to shew his consent ; the marriage was had ; the portion paid ; the lease was surrendered, and the wife's life put in ; the husband died. Then the widow sued the guardian to assign the lease to her for her life. And it was decreed that he should so assign ; and the decree was affirmed on a rehearing.

Hollinghead v.
Hollinghead,
2 Strange 604.

So where a man devised his estate to A. for life, with several remainders over, with power to the person in possession to limit any part of the premises for a jointure, not exceeding one moiety ; the first devisee for life, whilst an infant, married, and, with his mother,

ther, * entered into articles to settle lands of 100*l.* *per annum* on the wife for her jointure. But in the articles no notice was taken of the power. Before any jointure made pursuant to the power, the tenant for life died. And on a bill against the remainder-man to have the jointure made good, it was so decreed. [* 53.]

A woman, being an infant, may also, by an agreement entered into on her marriage, wave her right of dower and thirds incident by law to the act of marriage.

Drury v. Drury.
5 *Brown's Par.*
Ca. 570.

This seems a necessary consequence of the principle established by the house of Lords in the case of *Drury* and *Drury*, in which it was decided, that a woman being an infant, might, under the statute 27 *Henry* 8th, by contract to accept a jointure, preclude herself from her right to claim dower, or thirds, in her husband's real or personal estate. Upon which decision, courts of equity, following up the principle, have founded a variety of cases, wherein, by provision of the husband, a wife may be barred of dower, where the common law would not bar her : as on an establishment in the nature of a jointure settled out of * personal estate, if so framed as to import a jointure, whether expressed or no. This the court does by way of enforcing the agreement of the parties, and to prevent double satisfaction. Thus a bond given before marriage for the wife's livelihood and maintenance, was held a satisfaction for dower, though the word Jointure was not used.

[* 54.]

Vizard v.
Longdale,
1 *Vez.* 55.

But, if an agreement with an infant be without semblance of benefit to him, it will in *all cases* be void.

Therefore a bond with a penalty, although given for necessities received, will not bind him ; for it never can be for his advantage to enter into a penalty. That this is the principle upon which such a bond is void, is clear from the circumstance, that, if an infant and a surety enter into a penal bond for necessities for the latter, the bond will bind the surety, although it will not bind the infant. So that it is not the nature of the bond, but the incapacity of the infant, that makes it void.

1 *Roll. Abr.*
729. Pl. 8. Mo.
679. *Godb.* 219
Ca. 316.

And where agreements have been held to be in themselves

[* 55.] selves void against infants ; they * have, nevertheless, been considered as made binding by their subsequent assent when of full age.

And it is not necessary that the assent, in such cases, should be express, it seems sufficient that acts be done, from whence an assent must necessarily be inferred.

Thus an agreement, void in itself as against an infant, was nevertheless held binding; the infant having received interest under it, after he came of full age, Which resolution is founded on this reason, that the law will never intend a wrong in an act that can, by any construction, be made lawful.

So if an infant make an exchange of lands, and continue in possession after he come of age, he shall be bound by it.

Lord *Hardwicke* was of opinion, that the equity would be the same, suppose a woman, being an infant, and entitled to a small real estate of inheritance, were to marry ; and the husband, in consideration of that real estate, and that he should have and enjoy the inheritance for his own benefit, settled a * provision by way of jointure on her, whether of land or personal estate is immaterial, and then he died ; and she, after his death, took to that provision so made for her, and enjoyed it, and afterwards died : for, putting that case in argument, he says, the court of Chancery would not, in such case, suffer her heir at law to insist on the inheritance of that real estate by descent from her ; but would hold her heir at law bound by her subsequent agreement, she having thereby bound herself by her own acts, and departed from her interest in that real estate. And the court would decree her heir at law to be a trustee for the heir at law of her husband.

And such implied assent may be either permanent or temporary. Therefore if a woman marry, and a jointure is made after marriage, and the husband die leaving her an infant ; if she, without doing any act to determine her election, marry a second husband during her infancy, and he enter on the jointure estate, that entry will bind the husband and wife during the coverture.

And in some cases a mere acquiescence, after the infant's

Vide *Franklin v. Thornbury*,
1 Vern. 132.
Vide *infra*.

2 Vern. 225.
1 Eq. Ca. Abr.
282. 3. Vide
Durnford v. Lane, *supra*.

2 Vez. 526.

[* 56.]

3 Atk. 617.

fant's attaining his age, furnishes * a sufficient reason for a court of equity to hold an infant to his agreement; for if a man does not express his desire to be relieved, when he has convenient means, it is to be presumed that he is willing to abide by his original agreement; especially if those with whom the contract is made, be prejudiced thereby.

[* 57.]

Thus where a bill was filed for the execution of the trusts of a will, and to compel a sale, in order to raise portions and maintenances for younger children; and the heir, being a minor, in his answer desired the trust estate might not be sold, and offered to subject other lands, not within the trust, for the better raising of the portions, so that then a sale would not be necessary: the court of Chancery held the heir to his offer; because, by that means, he had delayed a sale. And the court said, that if he would have departed from what he had offered, he ought immediately, when he came of age, to have applied to the court, to have retracted his offer, and amended his answer, which he had neglected to do.

Cecil v. Salisbury, 2 Vern. 224.
1 Eq. Ca. Abr. 282. 4.

And where, on submission, an award was made between the bishop of *Bath and Wells* on the * one part, and an infant and his guardian on the other part, that, during the bishop's life and the infant's minority, they should both be at liberty promiscuously to dig lead ore, &c. and that the profits should be divided equally between them; Lord *Nottingham*, on a bill brought to confirm the award, being of opinion that the infant was bound by it, indemnified the trustees for what they had done, and decreed, according to the prayer of the bill, that the award should be established.

Bishop of Bath
[* 58.]
and Wells v.
Hypfley, cited
3 Atk. 614.

But there must be some equitable ground for the interposition of the court of Chancery, or it will leave such agreements to their fate at law. Therefore if an infant sell land for money, and then reinvest the money raised by the sale in the purchase of other land; this sale will not be aided in Chancery, because the person of the infant is *disabled* by a maxim in law.

1 Roll. Abr.
376. 5. 1 Eq.
Ca Abr. 282. 3.

And there are cases in which an infant shall be bound by his assent, even *at law*. Thus if he take an estate upon condition, he will, if he retain the estate, be bound by the condition, nor can a court of equity relieve him; for it cannot change the nature of infant's estates,

[* 59.]

* estates, nor make that absolute which is defeasible.

Pigott v. Ruffel,
Cro. Eliz. 124.

So if lessee for life, and he in the reversion, join in a fine to a stranger, and the reversioner reverses the fine for nonage, yet he shall not enter for the forfeiture; because he joined in the fine and consented to it.

1 Chan. Ca. 256.
1 Eq. Ca. Abr.
283. 7. Cro.
Eliz. 719.

Again, if an infant executor assent at seventeen to a legacy, such assent shall be good, if there are sufficient assets besides to pay debts, otherwise not.

1 Bac. Abr. 68.
Salk. 387.
Harris v. Lee,
1 P. Will. 483.

A feme covert is also, during the marriage, incapable of binding herself or her husband by her assent to any agreement, *in pais* she being, in consideration of law, under the coercion and dominion of her husband, and, consequently, having no moral capacity to assent to a contract either respecting his property or her own.

A feme covert, therefore, cannot, at common law, borrow money, nor contract a debt to bind her husband by borrowing money, even though such money be afterwards applied to buy necessaries, for which she may *bind him; because still it was in her power to have wasted that money. But if money be applied to the use of the wife for her cure from any distemper, or for necessaries, the person who lent her the money will, in equity, stand in the place of the persons who found and provided such necessaries for the wife; and as such persons would be creditors of the husband, so shall the lender stand in their place, and be a creditor also.

[* 60.]

But there are many exceptions out of this rule of the common law; for a wife may have separate property, as to any contract respecting which she has in equity the same capacity of assenting as if she were sole; therefore where a wife, authorised by settlement to dispose of her separate property, sells a part of it, a court of equity will bind her as a person equally competent with a feme sole.

And, in such cases, it is not necessary that her trustees be parties to the conveyance or consulted, unless their consent is made essential by the settlement; for the mere appointment of trustees is not sufficient ground from whence to infer, that such was the intention of the instrument creating the trust for her,
since

since * there must be trustees, or otherwise she could have no separate property.

[* 61.]

Thus where, on the marriage of A. and B. an estate was settled in trustees to receive the rents and profits for her sole and separate use, and as she should direct or appoint whether sole or covert. The wife, by deed of appointment, sold part to C. The husband covenanted against incumbrances. The trustees were not consulted. And, on a bill filed in Chancery to have the effect of this bargain, Lord *Hardwicke* decreed in favor of the purchaser, saying, that it was impossible not to decree to the purchaser, of this equity and trust the benefit thereof as against the wife, so far as purchased from her, and as against the husband, so far as he had bound himself by his own contract : for the rule of the court was, that when any thing was settled to the wife's separate use, she was considered as a feme sole, and might appoint in what manner she pleased, and, unless the joining of her trustees was made essential, there was no occasion for it.

Grigby v. Cox.
1 Vez. 517.

But it is always more prudent for the purchasers of such interests to talk with the trustees ; as their approbation will induce courts * of equity to view such transactions, which are generally contrary to the intent of the provision; with a more favorable eye.

[* 62.]

And an acquiescence by a feme covert in a court of equity, to any disposition of her separate estate, will operate as a virtual appointment.

Thus where a feme covert, having power to receive the profits of an estate to her separate use, and appoint them as she pleased, brought a bill jointly with her husband for an account, and submitted that the profits should be applied to the payment of her husband's debts, for which a decree passed ; she was held to be bound by this acquiescence, and the bill, to which she was made a party *without collusion*, was considered in equity as an execution of her power, in like manner as an actual appointment would have been.

Allen v. Papworth, 1 Vez.
163.

And any engagement made by a feme covert, respecting the disposition of her separate property in this or that way, may be enforced in equity against her, although her husband be out of the reach of the process of the court.

Thus

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[* 63.]
Bell v. Hyde,
Pre Chan 328.
Gill Rep. Eq.
 83.

* Thus where a woman, previous to her marriage, had her own fortune settled upon her ; and, her husband being very much in debt, and arrested, and the creditors going on to take out execution, and seize his goods, she, to prevent it, gave a note, that if they would discharge the action, (which was for 2000 l.) she would pay the debt out of her own separate estate, and the action was accordingly discharged. A bill, brought against her and her husband on her refusing to make good this agreement, was retained by Lord Keeper *Harcourt*, after advising with Sir *John Trevor*, master of the Rolls, and an attachment against her in the absence of her husband, was held to be regular.

So the general engagement of a wife will, in equity, operate upon her separate personal property, and apply to the rents and profits of her real estate ; and her trustees will be obliged to apply both, when they arise, to the satisfaction of such general engagement.

Peacock v.
Monk, 2 *Vez.*
 193.

Thus Lord *Hardwicke* said, in the case of *Peacock* and *Monk*, that, if a wife, having an estate to her separate use, borrowed money which she gave a bond to pay, this would give a foundation to demand the money * against her out of her separate estate, she being considered as a feme sole as to that.

[* 64.]

Norton v. Tur-
vill, 2 *P. Will.*
 144.

So, in the case of *Norton* and *Turvill*, where a feme covert, before her marriage, with the consent of her then intended husband, conveyed an estate to her separate use, and after her marriage borrowed 25 l. upon her bond and died. Though it was admitted that the bond given by the feme covert was absolutely void, and in that respect differed from a bond given by an infant, which was only voidable, yet it was held to be payable out of the separate estate of the wife, which was a trust estate for payment of debts.

Stanford v.
Marshall, 2 *Atk.*
 68.

So, in the case of *Stanford* and *Marshall*, the rents and profits of the separate estate of two femes covert were ordered to be paid by their trustees to creditors by bonds, in which they had joined with their husbands.

And an agreement, made by a feme covert with her husband respecting this property, will be binding, and will operate in the nature of an appointment.

Thus

OR AGREEMENTS.

Thus where E. devised hereditaments in * several counties to trustees during the life of M. his daughter, wife of Sir C. M. in trust, to pay the rents and profits during her life, *to such persons as she should appoint*; for her separate use; and *with which her husband should not intermeddle*, nor should the same be liable to his debts: and also directed that his executrix should, within six months after his decease, out of his personal estate, pay to his said trustees, or the survivor of them; 6,000*l.* upon trust to place the same out at interest with his daughter's approbation, for such purposes as she alone, by any writing executed in the presence of two or more witnesses, or any writing purporting to be her will, notwithstanding her coverture, should direct; so as the same should be for her own separate use, and not to be liable to her husband's debts or disposal, and devised other estates to the same uses, and died. And then, by articles between Sir C. M. and M. his wife; she, in consideration of his consent to her desire of living separate, agreed that he should have paid to him out of her separate effects 1000*l.* within three calendar months then next following, with 200*l.* *per annum*, parliamentary taxes deducted, for his life; payable quarterly. And it was thereby stipulated, that the agreement should be made * an order of court, and that the trustees should consent thereto, and that, until such consent and order could be had, the agent for M. and her trustee should give security by a bond of 1000*l.* penalty, conditioned, that either M. should perform the articles on her part, and that such order of court and consent should be had, or that M. should be delivered up again into the possession of her husband. And Sir C. M. covenanted that, on being paid the 1000*l.* and such consent and order being obtained, M. should live separate from him without molestation; and that he would give security for his performance of the articles. By an indorsement on these articles, made subsequent, the same were affirmed, and a proposal made for exchanging the 1000*l.* for an additional annuity of 100*l.* *per annum* to the husband for life. On a suit brought after the death of M. for a performance of these articles, it was decreed, that the articles were well executed by M. pursuant to the power vested in her by the will of E. her father, and that the same should be performed and carried into execution, as far as they remained unperformed by her and her trustees; which decree was afterwards affirmed, with costs, on an appeal to the house of Lords:

[* 65.]
 Freeman et al.
 v. Sir Cleve
 Mason, 2 Eqd
 Ca. Abr. 26. Pl.
 29. Bunb. 208.
 3 Brown's Pd.
 Ca. 378.

[* 66.]

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[* 67.]

* And a covenant in articles entered into before marriage, that a wife shall have the disposition of such real and personal property as she shall acquire during the coverture, is such an agreement as a court of equity will support, and render valid as to any equitable estate that shall accrue to the wife during the coverture. And any disposition thereof made by her, although it be without a fine, will be effectual to bar her heirs.

Wright v. Lord
Cadogan, et al.
6 Brown's Par.
Ca. 156.

Thus where an indenture was executed previous to the marriage of A. with B. reciting that B. was then entitled to a copyhold estate of inheritance and a rent-charge therein mentioned, and that she had great expectations of a considerable accession of fortune from several relations; and that A. not being in the actual possession of any estate out of which any provision might be made for her, it had been agreed between them, that the said copyhold lands and the said rent-charge, should continue to be to the sole and separate use of B. notwithstanding her intended coverture, and free from the controul or intermeddling of her intended husband, and not to be subject to his debts; and that all such estates either real or personal, or of any kind whatsoever, * which should or might descend upon or come to her during her coverture, or to her husband in her right by descent, or by virtue of any remainder or reversion, or of any devise, gift, or bequest, or by virtue of the statute of distributions, or by any other means whatsoever, should likewise be and enure to the said B. for her sole and separate use, free from the controul of the said A. and no ways subject to his debts, and to be applied and disposed of, from time to time, as she should, by any deed or deeds, executed in her life-time, or by her last will and testament duly made and published in the presence of three or more credible witnesses, direct or appoint, notwithstanding her coverture; it was therefore witnessed that, in consideration of the said marriage, and for better establishing and confirming the said agreement, the said A. covenanted with C. and D. that he would, as soon as conveniently might be, at the request of the said C. D. and B. execute and perfect all such deeds, acts, matters, and things, conveyances and assurances, as should be devised or advised by her counsel, for better and more effectually securing the said copyhold estate and rent-charge for her sole and separate use, notwithstanding her coverture; and from time to time, as often

[* 68.]

* as any estate real or personal should descend upon or come to the said B. or the said A. in her right, by descent, devise, bequest, or gift, or by virtue of any reversion or remainder then limited, or afterwards to be limited, or by virtue of the statute of distributions, or by any other means whatsoever, would execute and perfect such deeds, acts, conveyances, and assurances in manner aforesaid, for vesting the same in such person or persons as she should appoint in trust for her sole and separate use, and to be subject to such disposition as the said B. should from time to time, and all times thereafter make thereof, by any deed or deeds, writing or writings, under her hand and seal, or by her last will and testament, duly made and published in the presence of three or more credible witnesses; and that until the said B. should convey and assign the premises in manner above mentioned, it should be lawful for the said C. and D. and the survivor of them, or his executors, administrators, and assigns, to receive the rents and profits of the said copyhold lands, and the said yearly rent-charge, and also the rents and profits of all such lands as might or should descend upon or come to the said B. as above mentioned, during the intended coverture; and also all * such personal estate as aforesaid, and pay the same to her, or as she should appoint, for her separate use, and subject to the like disposition of the said B. notwithstanding her coverture.

[* 69.]

[* 70

At the time of executing this deed, B. was entitled to the reversion in fee of several estates vested in trustees, subject to an estate for life of W. S. and a limitation to his first and other sons in tail.

Ibid.

B. being thus entitled, duly executed in the presence of three witnesses her last will and testament, or deed of appointment, in the nature of her last will and testament; and, thereby, after reciting her marriage-articles, she, by virtue of the power thereby reserved to her, and of all other powers enabling her in that behalf, did limit, appoint, give, and devise all her estate, &c. as therein mentioned. And the question was, whether the articles executed on B's marriage, and her subsequent appointment, was a good and valid appointment of her estate, as against her heir at law.

Ibid.

It was contended, on behalf of the heir at law, that the proper and only methods of enabling a *feme covert* to

Ibid.

to

[*71.]

to dispose of her* inheritance by deed or will, or writing in nature of a will, operating as an appointment, were, either by a conveyance to uses or trusts before the marriage reserving such power, or else by fine, in which she and her husband joined after the marriage, with a deed to lead the uses of it, reserving such power, to her over the inheritance vested in the devisees. But that, unless one of these methods was taken, her will of real estate would be void as an instrument or conveyance, and could not bind her heirs. That, in the present case, the power rested only upon articles between husband and wife, without any estate vested in trustees out of which an appointment, by virtue of the power, was to enure. That B. might have appointed her estate as against the husband and his heirs, to whomsoever she thought fit, the articles being made for valuable consideration, as against the husband and those claiming under him; but that, as between her own heir at law and the devisees, it was a question merely between volunteers, and consequently they could claim no aid in equity to supply a defect in the capacity of the testatrix, as a married woman, to make her will, when such will must take effect as an appointment in execution of the power, or not at all; and the * power, in this case, remained only in covenant between her and her husband, without depending upon any estate vested in other persons, out of which it could take effect. On the other side it was contended, that the legal estate in the hereditaments devised was then outstanding in trustees, and therefore no formal conveyance of it was by any means necessary, as such conveyance could not affect the legal estate, or have any legal operation; it could amount only to a direction to the trustees to become trustees thereof for such persons, intents, and purposes, as she should by deed or will appoint. And as B.'s interest was only equitable, the general agreement and intention of the parties, clearly and indubitably expressed in the articles, were equally as strong and binding as an equitable conveyance; and did, in effect, amount to a direction to the trustees and their heirs, to stand seised of the reversion in trust, and for the benefit of such person and persons as she should appoint, and in the mean time for her separate use, exclusive of her intended husband; and especially as he, by the articles, covenanted to do all necessary acts, to enable his wife to make any such disposition or appointment of her reversion as she should think

[*72.]

think fit, either by deed *or will ; by which covenant he was bound, in equity, to do all necessary acts for authenticating and establishing of any deed or will which she should make concerning the same. And upon these grounds Lord *Northington* decreed in favor of the devisees and support of the appointment. Which decree was affirmed on an appeal to the house of Lords.

[* 73.]

And the law is now held to be the same, in respect to separate property so circumstanced, in which a feme covert has a legal estate ; this was so determined in the case of *Rippon* and *Hawdin*. There a woman was entitled to a legal estate in lands, and her husband, previous to his marriage with her, gave bond to trustees, conditioned that she should have power, by will to dispose of her estate. She accordingly did so. And Lord *Camden* decreed the heir to be a trustee for the devisee, observing that this case was not to be distinguished from the case of *Wright* and *Cadogan*. *Sed quære*.

Rippon v. Hawdin, in Chan.

And a *feme covert* may, by acts done after the coverture is determined, render an agreement respecting herself, made whilst she was under coverture, binding upon her property *by relation ; because acts done after the becoming a widow will bind.

[* 74.]

Thus where a provision was made by Sir *Edward Moseley* for his lady in lieu of her jointure, by articles during her coverture, and she, after the death of her husband, entered only on forty-six pounds *per annum*, part thereof ; she was held to performance of the whole articles.

Sir *Edward Moseley's case*, cited 2 *Vernon* 225.

So, where a mortgage, in the form of a lease, had been granted of a feme covert's estate by the husband and wife, and, after the husband's death, the deed being in the hands of the mortgagee, the wife had directed the tenants, in possession to attorn to the mortgagee, had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for a number of years ; the court of King's Bench were unanimously of opinion, that the conveyance in this case, though in the form of a lease, was in substance a mortgage ; and not being within the reason for which leases by a feme covert were held to be only voidable, was absolutely void on the death of the husband ; but that the acts done by the widow, the

Goodright, lessor of *Carrier*, v. *Strathan*, Dougl. Rep. 53. 1102 17. S. C. Cowper 201.

[* 75.] the deed being in * the possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, was equivalent to a new grant.

And there are several cases in which a feme covert may, even at law, contract, and thereby entitle herself to or become the subject of an action, without her husband being joined, and as a feme sole.

Thus if a husband has abjured the realm, or is banished, he is thereby *civiliter mortuus*. And he being disabled to sue or be sued in right of his wife, she is in such case, considered as a feme sole; for it would be unreasonable that *she* should be *remediless* on her part; and equally so on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her.

And a wife, being considered in such cases as a *widow*, is suable on her general contracts.

Thus King *Edward* the Third brought a *quare impedit* against the Lady of *Maltravers*, to which she pleaded that she was covert of * baron; wherunto it was replied for the king, that her husband was *put* into exile; and thereupon she was ruled to answer. So King *Henry* the Fourth brought a writ of right of ward against *Sibyl Belknap*, who pleaded that she was covert baron, to which a like reply was made by the king. And *Gascoigne C. J.* *ex assensu sociorum*, awarded that she should answer.

So it is said in *Moore's Rep.* fol. 666. Ca. 910, that after a divorce *a thoro et mensa*, the wife may sue alone without her baron.

So it was held, in the case of the Countess of *Portland* and *Podgers*, that where the husband was, *by act of parliament*, banished for life, the wife might in all things act as a feme sole, and as if her husband were dead; and that the necessity of the case required that she should have such power.

And, in the case of *Sparrow* and *Caruthers*, Mr. Justice *Yates* thought transportation, although but for seven years, to be such an absence of the husband, within the *reason* of the cases of abjuration, &c. as that the wife might, during that period, be sued alone.

And

1 Bac. Abr. 308.
1 Roll. Rep. 400
Jenk. Cent. 4.
1 Com. Dig. 18.

Moor 851.
10 E. 3. Pl. 37.
[* 76.]
fol. 399. Co.
Litt. 332. b.
1 H. 4. 1.

Countess of
Portland v.
Podgers,
2 Vern. 104.
Vide Co. Litt.
123. a.

Vide Co. Bank.
Law 26, 1 Bac.
Abr. 308.

OR AGREEMENTS.

* And Lord *Holt* was of opinion, in the case of *Darley* and the Dutcheſs of *Mazarine*, that if a woman married an alien enemy, ſhe would be chargeable as a feme ſole for her debts and contracts, as much as if her huſband had abjured or been baniſhed.

[* 77.]
1 Salk. 116.
1 L. Raym. 147.

So, by the cuſtom of *London*, if a feme trades by herſelf in a trade with which her huſband does not intermeddle, ſhe may ſue and be ſued as a feme ſole.

10 Mod. 6.

Of late years ſome other caſes likewiſe have been conſidered, even at law, as exceptions out of the general rule, that a feme covert is under an incapacity of entering into a general engagement to bind herſelf or her property; upon the ground of there being caſes begotten by the practice of modern times, which are not within the ſpirit, although they are within the letter of the rule. The inſtances alluded to are thoſe, wherein it has been held, that a feme covert, living as feme ſole on a *ſeparate maintenance*, allowed her by her huſband on a ſeparation after marriage, ſhall not be permitted, if ſhe gain credit in that character, to plead her coverture, in order, thereby, to prevent her creditor from recovering his debt.

* The firſt caſe of this kind was that of *Ringſlead* and Lady *Laneſborough*, which was an action brought by the plaintiff againſt the defendant for goods ſold by him to her. The defendant pleaded, that at the time of the promiſe ſhe was *covert baron* of Lord *Laneſboro'*, a peer of *Ireland*, who was ſince dead. To this plea the plaintiff replied, that the defendant lived ſeparate from her huſband, they having been parted before the promiſe made, and that ſhe, by a deed of ſeparation, had a large ſeparate allowance, which was duly paid. And that the defendant lived in *England* and her huſband in *Ireland*. To which replication there was a demurrer. Lord *Mansfield* delivered the judgment of the court in favor of the plaintiff, *but expreſsly declared, that his opinion was founded on all the circumſtances of the caſe taken together, and would only be an authority in a caſe circumſtanced exactly ſimilar to the preſent.* The circumſtances were, that the wife lived ſeparate from the huſband, and had a ſeparate maintenance; he *being* in *Ireland*, ſhe in *England*; that ſhe acted as a feme ſole, and it was a fraud in her to attempt to avoid her contracts by this defence; that this agreement, though between huſband and wife, bound each of them

[* 78.]
Ringſlead v.
Laneſborough.
Hil. 23 Geo. 3.
B. R. Vide
Coke's Bank.
Law 24.

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[*79.]

as * effectually as if they were single. That the wife, under this agreement, had a property of her own ; that she was under no power even of her husband ; that the reason of her incapacity ceased ; the creditor could not sue the husband ; that when she contracted, she did it as a single woman ; that after having got credit as a feme sole, she never should be permitted to say, that she was married ; and more particularly when the consequence was not to make another person liable, but to prevent the creditor recovering his debt at all. That there was no case precisely in point, and therefore the court must make a new precedent, from reason, conveniency, and analogy to the authorities.

In the last mentioned case, the husband's being *resident abroad* was relied upon as a *strong* circumstance, forming an analogy between that case and the cases which had gone before of persons exiled, abjuring the kingdom, transported, or the like. But the following case takes a broader ground, it having been therein held, that *where the husband is not himself liable to his wife's debts*, his being within the kingdom will make no variation. Therefore, where an action was brought for * goods sold and delivered to the defendant, and she pleaded coverture : it was replied, that the defendant lived separate and apart from her husband ; that she had a competent separate maintenance regularly paid ; and that the goods, mentioned in the declaration, were furnished for her separate use and support. There was a demurrer to the replication, and judgment for the plaintiff. The court observing, that though stress was laid upon the husband's being abroad in Lady *Lanesborough's* case, yet that made no difference, for that the principle of the judgment in that case was, "*that the husband was not liable.*"

The two foregoing cases, it is observable, arose upon actions brought to recover the *price of necessaries* purchased by femes covert, who were separated from their husbands, and, on their separation, furnished, by agreement, with the *means* of maintaining themselves.

But the doctrine of the capacity of a feme covert, so circumstanced, to bind herself, at common law, by her assent to contracts, has been in a later case, carried still further ; to an extent indeed, which, if it can be supported upon principles of law, will leave her, as to
her

Barwell v.
[* 80.]
Brooks, Hil.
24. G. 3. B. R.
Co. Bank, Law.
28.

OR AGREEMENTS.

* her moral capacity of *contracting*, in *all* respects in the same state, as if she were a feme sole.

[* 81.]

The case alluded to is that of *Corbett* against *Poelnitz*, the declaration in which stated the following facts : That *Ann*, before her marriage with Baron *Poelnitz*, was the wife of Lord *Percy*. That, after their marriage, a separation took place by mutual agreement, and *Ann* had a competent maintenance of 1600*l.* per ann. settled on her by deed. That then *Ann* (whilst she was so covert with Baron, and whilst she lived so separate and apart from him, and whilst her maintenance was duly secured and paid to her) in consideration that *Corbett*, the plaintiff, at the special instance and request of *Ann*, and for and in consideration of the sum of 900*l.* paid by *Chambers* to *Ann*, had then and there become held and firmly bound, together with *Ann*, to *Chambers*, by their joint and several bond in 1800*l.* conditioned for the payment of an annuity of 150*l.* during the natural life of *Ann*; and had also, at the like special instance and request of *Ann*, together with her, executed a warrant of attorney for confessing judgment on the bond for * 1800*l.* and costs of suit, at the suit of *Chambers*, undertook and promised faithfully to indemnify *Corbett* against the said bond, and warrant of attorney. That afterwards, and after this promise, the marriage between *Ann* and Lord *Percy* was dissolved by act of parliament, by which the same provision of 1600*l.* was continued and secured to her for life: That afterwards, *Ann* was married to Baron *Poelnitz*. That after this marriage, 262*l.* 10*s.* became payable to *Chambers*, by virtue of the condition of the bond for one year and three quarters annuity, whereupon judgment was entered upon the bond for the 1800*l.* and 63*s.* costs; and thereupon *Corbett*, to prevent his being taken in execution, had paid the 262*l.* 10*s.* and 5*l.* 19*s.* costs; yet, that Baron *Poelnitz* and *Ann* had not paid him the same, or indemnified him against the payment thereof. A verdict being given for the plaintiff, a motion was made in arrest of judgment, upon the ground, that, although in modern times the law allowed a woman to have a separate maintenance, yet that was only an exception to the general rule; and extended no further, than to enable the wife to provide herself with necessaries; that this fund, being given for necessary maintenance,

Corbett v. Poelnitz. Terra Rep. vol. 1. 8.

[* 82.]

H

therefore

[* 83.]

* therefore was only liable for necessaries : that although the court had gone so far, as to say, *when a wife agreed to receive a separate maintenance, she should be answerable for such maintenance*; yet that did not prove that she was so much a *feme sole*, as to be able to make or bind herself by every species of contract. The court gave their opinions separately on the question. Lord *Mansfield* said, that the facts laid in a very narrow compass, and admitted of no doubt. Lord and Lady *Percy*, by a deed, mutually agree to live separate; neither can break this agreement; and a large maintenance is settled on her for her own private separate use, as a *feme sole* to all purposes, the same as if she were unmarried. The claim upon which this action is founded, is of a most meritorious nature. Lady *Percy* applied to the plaintiff; he considered her as a *feme sole*, and became surety for her: she promised to indemnify him; and the contract was concluded, under a firm belief on both sides, that it was perfectly valid and binding. In Justice, then, she ought to pay this debt. But then, to encounter this, there is a rule of positive law, which is to be adhered to and preferred, though in some particular cases it may seem * productive of hardship and oppression. By this general rule, a married woman can have no property, real or personal. Her contracts are entirely and universally void; for her contracts, even for necessaries, are the contracts of her husband: she cannot be sued, or taken in execution. This is the general rule. But then, it has been properly said, *that as the times alter, new customs and new manners arise*: these occasion exceptions, and justice and convenience require different applications of these exceptions, within the principle of the general rule. The question then is, whether it is so here? whether, under the circumstances of the present case, a married woman should, or should not, be sued solely? exceptions have been made in this very case. Where a husband is in exile, or has abjured the realm, and credit has been given to the wife alone, *justice says she must pay, for the husband cannot be sued*. So it is in the case of transportation, though the case is not exactly the same; for, there, the absence is only temporary, because the husband may come over, and be sued afterwards. Why, then, is it so established? because the wife acts as a single woman, gains credit as such, receives the benefit, and shall

[* 84.]

shall be liable * to the loss : and where she has an estate to her separate use, in justice she ought to be liable TO THE EXTENT OF IT. In modern days, a new mode of proceeding has been introduced, and deeds have been allowed, under which a married woman assumes the appearance of a *feme sole*, and is to all intents and purposes capacitated to act as such. In the ancient law, there was *no id. a* of a separate maintenance ; but when it was established, what said the courts ? that the husband shall not be liable even for necessaries ; and they said so, because convenience and justice required it. In the present case, no distinction has been taken at the bar, whether supposing Lady Percy to be liable, her second husband is so ; and they have done right, for so he must certainly be. The only question then is, whether a woman married, but living separate from her husband by agreement, having a large separate maintenance settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, shall be sued as a *feme sole* ? I think she should ; it is just that she should be so, I am of opinion, that the present case is determined by the two late ones which have been cited (*viz. Ringstead and Lady * Laneborough, and Barwell and Brooks*) which do not rest upon one or two circumstances as contended, but upon the great principle which the court has laid down, “ that where a woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such.” There is the same justice in this case, nor can I see any difference between them. *Willes*, Justice, concurred.

Ashurst, Justice. It seems to me, that to decide the present question, we need only consider the *reasons* on which the incapacities of a *feme covert* are founded ; not on the same ground as those of an infant, whose disabilities arise from a want of discretion ; but first, because she has no property ; and secondly, because it would be unreasonable to permit the wife to affect the property of her husband, except where he will not allow her necessaries ; in which case her contracts are the contracts of her husband. Now, where a woman has a separate maintenance, and the husband cannot be charged, it follows *naturally that she must* ; and if so, we cannot draw a *precise* line, and say, she shall be liable for this, and not for that ; for her incapacity, arising

[* 85.]

[* 86.]
Vide *sup.* Lady Laneboro's case, said by L. Mansfield to be only an authority in a case circumstanced exactly similar to itself.

Quere of this principle, vide *infra*.

[* 87.]
Vide supra in
this case, contra
per L. Mans-
field.

V. contra, inf.

arising from want of property, *being once removed, she is, in my opinion, suable for all. But if, as was supposed, she were only liable in respect of her separate maintenance, she could not be liable generally, but only so long as the maintenance continued, after the manner of an executor, as long as assets remain in his hands. That, however, cannot be: if she exhaust her whole fund, it is her own folly, but does not render her less liable. As to her being only liable in respect of her first settlement, such a doctrine was never before contended. If she be liable at all, she is liable generally, and that not only for necessaries, but *for all contracts*. I think the other two cases govern this, and that the rule for arresting judgment must be discharged; for she gained a general capacity to contract debts, and consequently her second husband takes them, for he takes her *cum onere*.

Buller, Justice. The only considerable distinction to be found between this case and that of *Ringstead* and *Lady Laneborough*, is the non-residence of *L. Laneborough*: but that is entirely done away by what the court said in *Barwell* and *Brooks*, that it made no sort of difference whether the *husband was in *England* or not, for he was not liable; which was the great principle that influenced the decision, and not his local situation. Hence, then, we have only to consider, whether it is possible to draw the line, that the wife shall only be liable for necessaries. The opinion of the two judges in *Hatchett* and *Baddeley* went wide of it, and it has never been much pressed: but I think the objection has no force, for if she has a power of contracting, it must be a general one. A distinction has been made as to the fund that is liable; and it has been asked, what if she alien the whole? the argument however, stops short; for it ought to have shewn, that the husband would again become liable in that case; but there is no colour to say, that, if the wife spends the whole of her settlement, her husband shall be liable even for necessaries. As to the prudence of the measure, there is no ground on which the court can found their decision. In *Lady Laneborough's* case, the only question was, whether she could acquire a capacity to contract? it was determined she could; and, therefore, as I think that case must govern the present, I am of opinion that the plaintiff may recover.

I have

[* 88.]

Vide this case
infra, where De
Grey C. Just. &
Blackstone, are
clearly of opin-
ion, that a feme
covert cannot
bind
herself by her
acts under seal.

Quære, wheth-
er this be a true
principle.

Quære, de hoc,
vide supra.

* I have stated the arguments of the court in the above case at length ; because, if the decision which was founded upon them can be supported, it establishes a principle, upon the foundation of which a feme covert may, at law, execute instruments, give bond, confess a judgment, enter into contracts under seal by way of covenant or otherwise, and act, to all intents and purposes, as a single woman. For the action here brought, proceeds upon the ground that *Corbett*, the surety, has paid the money on account of the principal, and has thereby discharged the principal from the debt ; upon which the law raises an implied contract, whereby the principal is supposed to have bound himself to indemnify the security. The consideration, then, upon which this implied contract is raised, is the discharge of the principal. But the principal cannot be said to be discharged from that, to which she never was liable ; consequently, if this decision be law, it must be on the ground that *Lady Percy* was bound : the necessary inference from which will be, that a woman, so circumstanced, may bind herself at common law by bond. And if she can bind herself at law by bond, so may she likewise by any other instrument under seal.

* But it has been again and again adjudged, that a bond given by a feme covert, is, at common law, *ipso facto*, void, and shall neither bind her nor her husband. Then, as the implied contract, upon which the action brought by the surety is founded, rests on the surety's having discharged the express contract, and as a void contract cannot be discharged, there being no discharge, there is, in this case, no consideration to support the assumpsit : but it must resemble the case of forbearance given to an infant upon his bond, which has been decided to be no consideration to support an assumpsit, the infant not being liable to pay at the time of the forbearance.

But it is said, altho' it be true that it is a rule of *positive law*, that a married woman can have no property real or personal, and that, therefore, her contracts are entirely and universally void ; yet, that modern times have introduced new customs and manners, and that deeds have been allowed, under which married women assume the appearance of femes sole, and are to all intents and purposes capable to act as such.

[* 89.]

[* 90.]
Vide *Norton v. Turvill*, 2 P. Will. 144, S. C. supra. 1 Bac. Abr. 695.

[*91.]

The term *modern times* is a relative term, * so vague in its nature, that one is at a loss to affix to it any certain idea. It is true that the common law had no notion of distinct interests between husband and wife, over which she could have a general disposing power; and it is no less true, that the notion of a *separate maintenance* has been recognized in equity from very early periods; for courts of that description have universally interposed in controlling and overlooking the application of this species of property, and making decrees respecting it for more than a century. But *Perkins*, whose writings were composed and published so early as the reign of *Edward the 6th*, expressly lays it down, *that, if there be a difference betwixt the husband and wife, by reason whereof certain LANDS of the HUSBAND are ASSIGNED unto the wife by the friends of the husband and by his assent, and the wife grant a rent charge to be issuing out of the same lands unto a stranger, the grant is VOID.*

It is true, that it is only in very late times, that courts of law have supported actions against married women, unless in instances where they have been considered as under a civil widowhood; which differed from the case of a separate maintenance, in as much as this was a separation *by act of law*, and, * therefore, a woman, so circumstanced, was entitled to her dower or jointure, and was, in consideration of law, to all intents and purposes, a single woman; whereas the rights of the husband of a woman having a separate maintenance, to all other intents and purposes, except as to the disposition of that maintenance, remain as they were previous to such a settlement. He is entitled to any property she acquires by gift. He may release a legacy bequeathed to her. He will be entitled to the rents and profits of a real estate descending upon her. She remains under the same incapacity of disposing of her real estate, nor can she contract as to any part of her personal estate, not comprized within her separate maintenance.

It is also alledged, "that as, where a woman has a separate maintenance, the husband cannot be charged, it follows naturally that she must." If the reason why a feme covert is not suable for contracts entered into by her, were, that her husband is so chargeable, the contrary proposition might be fairly inferred, where the husband is not so. But as the principles upon which a feme covert's incapacity is founded, are quite of another nature,

1 Chan. Rep.
44, 164 Finch's
Rep. 56, 73.

Perk. 4, sec. 8.

Wayland's case,
3 Bulst. 188.
[*92.]

O R A G R E E M E N T S.

nature, stating *the true principles will evince the weakness of such an argument.

[* 93.]

The disability of a feme covert to contract, arises from three circumstances: First, For want of POWER to *assent* so as to bind *herself*, she having in *consideration of law*, no *will* of her own, her will being, by the marriage, subject to that of her husband. Secondly, For want of power to bind her husband. Thirdly, For want of property.

By the common law a wife is disabled to make any grant, contract or bargain, without the authority, allowance, and consent of her husband. And if a feme covert make a contract in the market, or elsewhere, even for bread to maintain the family, and it be found *expressly* to have been made *without the allowance or consent of her husband*, the contract is void, and shall not charge him, even although it be expended in the household of the husband. But if the wife, cohabiting with the husband, has a general licence from him to buy necessaries, her contracting (without being particularly authorised as to the time) for necessaries for herself, her husband, her children, or her family, is evidence to a jury to find the assent * of the husband unless the contrary be expressly shewn; because it cannot be reasonably presumed, that any man would deny his assent to have the necessities of his family supplied. It is true that a wife ought to be maintained, and it is the more necessary that it should be so provided by our law, as it takes away all property from her, by which she might provide for her own subsistence; therefore if her husband turn her out of doors, the law implies that he gives her credit for common necessaries, and to that extent considers her contracts as his. But in neither of these cases is her right to be maintained, founded either on a right she has to contract for herself, or on a power the law gives her to charge her husband by way of contract, but there must in both cases be his assent, either express or implied. The contract must be *his*, and not her contract. And therefore it is that, upon her departure from him she cannot bind him, even by her contract, for common necessaries; for, from the moment of her separating herself, all evidence of the consent of her husband to maintain her ceases, and the obligation so to do is also at an end.

Old Nat. Brev.
62. 21 H. 7. 40.
b. Pl 64 Bro.
Abr tit Con-
tract 19. 1 Roll.
Abr. 3: 1 (L)
Pl 5. 20 H 6.
22 1 Mod.
Rep. 126. Fitz.
Nat. Brev. 277.

[* 94.]

OF THE ASSENT TO CONTRACTS

[*95.]

But if the proposition put by the court in * the Baroneſs *Poelnitz's* caſe were true ; viz. “ that when the obligation in the huſband to maintain ceaſes, the capacity of the wife to contract begins,” a wife, on her departure from her huſband, would inſtantly be bound by any contracts ſhe ſhould make. But the law is otherwiſe ; for, though the act of departure deſtroys the evidence of the huſband's conſent to her having neceſſaries, becauſe it would be unreaſonable to bind him by an implicit conſent to keep two houſes, it does not diſſolve the marriage, or reſtore to the wife the power of volition, which, from the time of the intermarriage, the law, that looks upon the huſband and wife as one perſon, and, therefore, allows but one will between them, which it conſiders as placed in the huſband as the fitteſt and ableſt to provide for and govern the family, deprives her of. And when it is conſidered, that the law gives to the huſband the abſolute power over her perſonal property, and the government and direction of her real property during the coverture, it is but reaſonable that, as her departure does not reſtore her power over thoſe, neither ſhould it ſubject her to her contracts, which, without her property, ſhe muſt be incapable to diſcharge. Many caſes might be * put to ſhew that it by no means follows, that the huſband's being diſcharged makes the wife chargeable.

[*96.]

1 Salk. 118.

2 Roll. Abr.
350. E. 1. 3.

Ibid. E. 4.

Strange 875.

Ex gratia, if a woman, reſiding with her huſband, take up goods, as ſilks or muſlins, and pawn them before they are made into cloaths, the huſband is not bound to pay for them, becauſe they never came to his uſe. Yet no man will ſay that the wife is therefore liable. So if a woman borrow money, and cloath herſelf in a better manner than her rank requires, although this comes to the uſe of the huſband, becauſe the wife muſt of neceſſity be cloathed, yet the cloaths being beyond her eſtate, her huſband ſhall not be chargeable with the money. And if a wife buy any thing, the huſband ſhall not be bound to pay for it, unleſs it come to the uſe of the huſband. And yet in neither of theſe caſes ſhall the wife be liable. And Lord Chief Juſtice *Raymond* held, in the caſe of *Child* and *Hardiman*, that if a woman elope from her huſband, though ſhe does not go away with an adulterer, or in an adulterous manner, a tradesman truſts her at his peril, and the huſband is not bound.

2 Blackſt. 1079.

Lord Chief Juſtice *De Grey*, in the caſe of *Hatchett* and

And *Baddeley*, lays down the law in * these forcible terms. "No act of the wife can ever make her liable to be sued alone. If she can be sued, *she can sue*, acquire property, release actions, *execute deeds*, &c. WHICH WOULD OVERTURN FIRST PRINCIPLES." And *Blackstone*, J. said, "that it seemed to be supposed by the argument, that if the husband was not bound to pay this debt, it followed that the wife might be compelled alone. *But this was no legal consequence*. He thought, in the then present case, IT COULD NOT BE RECOVERED OF EITHER. And he was clearly of opinion, that in no case could any *feme covert* be sued alone, except in the known excepted cases of *abjuration, exile, and the like*, where the husband was considered as *dead*, and the woman as a *widow*, or else as divorced *a vinculo*. And therefore *Elizabeth Wilmot*, whose husband was abroad when she attempted to sue alone, did it with the addition of *Widow*. The contrary doctrine militated *against* the FIRST PRINCIPLES of the *English* law, which considered the woman's powers, nay almost her very being, as suspended during the coverture. Her contract was merely void so as to bind herself, said all the judges in *Manley* and *Scot*. She and her husband might plead *non est factum* to her * bond. If judgment were had against her, or she were outlawed, her husband and she might reverse it by writ of error. The very forms of the action demonstrated the same thing, if sued alone she could have no addition, which was in the very teeth of 1. Hen. 5. c. 5. If sued in her maiden name, it was a misnomer: If by her husband's name, and as a widow, it was the like. She could not put in bail without her husband. And as the previous steps were thus embarrassed, so after judgment the remedy must prove defective. No *elegit* could go against her lands, otherwise this would be a mode of alienation by a *feme covert* without a fine. It would be endless to pursue this idea through all its legal ABSURDITIES.

It will hardly be contended, after what has been observed, that the principle, upon which a married woman is discharged from her contract, stands upon the ground, *that her husband is bound by her contract*. And if that be not the principle, the conclusion founded upon it; "that if the husband be discharged, the wife must be bound," will be equally fallacious.

[* 97.]

Co. Litt. 133.
Moore 251.

1 Sid. 110.

Salk. 7.6. Mod.
[* 98]
311.2 P. Will.
144.

Bro. Abr. Error
172.

6 Mod. 312.

Cro. Ja. 445.

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[*99.] * But it is said, that the circumstance of a separate maintenance being provided for the wife alters the case. In a degree it does so, even at law; and that consistently with first principles and former adjudications. It has been stated, that the true ground upon which a husband, who turns his wife out of doors, is liable to be sued for necessaries purchased by her, is, that the law, which takes from her the capacity of contracting herself, in its humanity, concludes, that in such case, her husband consents that she shall contract for him to this extent, and the fact of the expulsion is evidence of this consent. But, if the husband provide a separate maintenance, the presumption that he intended to give her credit on his account for necessaries fails, the positive provision rebutting any such conclusion upon him. In such cases, then, the property may be made liable to this purpose, without any deviation from the rule, as to a feme covert's capacity to contract, by considering the separate property, as answerable, by the assent of the husband, for the wife's maintenance. This mode of considering the case seems warranted by the forms of proceeding, for it is necessary, in all such cases, that the husband should * be a co-defendant. "And if he be not a party to the record, the whole proceeding will be vitious. There is no instance in the books, of an action's being sustained against the wife, the husband being living at home, and under no civil disability. *A wife, by a VOLUNTARY separation, does not acquire such a character, which may be called a civil widowhood, nor is taken notice of by the law as such.*"

[*100.]
Per Curiam
unan. in *Lean*
vers. *Schutz*,
2 Blackst. Rep.
1195.

Supra.

This, then, seems to be the only ground upon which the case of *Barwell* and *Brooks* can be supported, and not the assumed principle, "that the husband was not liable, and that, therefore, the wife was."

Vide 3 Bulst.
188.

The analogy assumed between these cases, and the cases where the husband is exiled, or has abjured the realm, or the like, is equally fallacious; because those cases are founded upon the *civil* death of the husband; for that amounts to an *actual dissolution* of the marriage, entitles the wife to her dower, or jointure, &c. and, consequently, restores her to her original capacity of *taking property in her own right*, and of binding herself *by her own assent*, without reference to her husband.

Vide *Newsome*
v. *Bowyer*,
3, P. Will, 37.

But

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* But it is said, "that it is impossible to draw the line, that the wife shall be only liable for necessaries." This is begging the question. That she may be considered as liable, in law, to the extent of her separate maintenance only, is clear. That she ought to be charged no further, in equity, will be evident, if we advert to the principle upon which this property is liable to her contracts, and to her situation in relation to her husband and the public. The true principle as has been shewn is, that her husband assents to this property being liable to her maintenance, and that, therefore, her contracts entered into for that end attach upon it. Then, in the relative situation in which she and her husband still stand, she can acquire no other property. If estates descend to her, or personality be distributed to her, the husband's claim is not barred. She cannot dispose of the one, or levy a fine of the other, without his consent. If her property be limited, so ought her capacity of rendering herself liable to be limited. Then, as to the public, they are in no worse a situation, than if they give credit to a woman who elopes. It is a risk the law imposes on those who give credit to women. If it be an inconvenience, it must be remedied *by the legislature who make laws, not by courts whose *province* is, by the constitution, confined merely to the exposition of them.

But the common law recognizes, and admits a distinction between the separate maintenance and general property of a feme covert : for *per Holt*, if husband and wife be divorced *a mensa et thoro*, and a legacy be left to the wife, and the husband release it, she is thereby barred ; and the law is the same as to an obligation made to her before marriage, for the marriage continues, and the husband hath all her right ; but if, in such case, the wife has her *alimony*, and sue for defamation or other injury, and recover costs, and the husband release them, this shall not bar the wife : for these costs come *in lieu* of what she has spent out of her alimony, which is a *separate maintenance*, and not in the power of her husband.

And courts of equity assist creditors no further, than to make the separate maintenance liable to the satisfaction of their debts.

Thus where Sir R. A. and his lady, by reason of some discontents in the family, agreed to live apart, and

[* 101.]

1 Salk. 116.
Pl. 6.

[* 102.]

1 Salk. 115, 116.
Cro. Eliz. 908.
Moore Ca 910.
5 Mod. 71.
Cro. Car. 463.

Kenge v. Delavall, 2 Vern, 326.

Ibid.

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[* 103.] and there was a separate * maintenance settled upon the lady, but determinable upon either of their deaths. The lady contracted several debts during the separation. Sir R. died. A bill was then brought to subject the defendant's jointure to the payment of the plaintiff's debt. *Et per* lord keeper, Had the separate maintenance continued, there might be some reason for the creditors to allow that, and make it liable to their satisfaction; but that being determined by the death of the husband, he did not see which way the jointure could be charged with it.

But it is said, that in equity, a woman having a separate estate may be sued as a feme sole. Then why should a fair creditor be sent there to seek redress? the answer is obvious, the subject matter to be affected falls under the proper jurisdiction of a court of equity, whereas, with relation to the wife, *the law does not recognize it*. It being a principle of law, that no division of property can subsist between husband and wife, they being as one person, it follows, that no contract between them can be binding, except by the intervention of a trustee; therefore every separate estate of a feme covert, of whatever * nature it be, must be a trust estate, and as such cognizable in equity only. Upon this principle alone, such an estate was held in the case of *Norton and Survill* not to be within the statute of limitations, so as to be protected in equity by that statute from the demands of a creditor, whose debt had been contracted at the distance of ten years.

“ But, even in a court of equity, there is no instance of a personal decree against a feme covert for payment of a sum of money. If a feme covert, so circumstanced, have contracted that this, or that portion of her separate estate shall be disposed of in this or that way, she and her trustees may be decreed to make that disposition; but if she enter into an engagement, which would make a feme sole liable to the whole extent of her contract, as to her person, &c. in every respect, *it is clear such general engagement would not bind her as such*. The utmost extent of determined cases is, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and

[* 104.]

Vide *supra*.

and profits of real estate when they * arise, to the satisfaction of such general engagement." The law was thus laid down by Lord *Thurlow*, in the case of *Hulmé* against *Tenant* and his wife, wherein *Ld. Thurlow* took the distinction between proceeding *personally* against the feme covert, and carrying into effect the general engagement of a wife upon her personal property, and the rents and profits of her real estates, by obliging her trustees to apply them as they arose, to the satisfaction of such general engagement; his lordship refusing to decree a feme covert to execute a power of appointment over her separate estate, in order thereby to satisfy a bond entered into by her; and observing, "that although the remedy in equity was *more extensive* than in a court of law, yet he did not find that a court had ever ordered a power to be executed. They had industriously stopt short of so doing, and had only given a remedy by stopping the fund, where the power was executed." And his lordship refused to decree the feme covert to execute her power, although he was extremely clear, that the wife's leasehold would be liable to her contract.

Now, if it be true, that the proper jurisdiction over property of this kind belongs to * a court of equity, it may be questionable, whether that court would, in any case, interpose to give effect to a general engagement of a wife who had a separate maintenance, to part with that maintenance, whatever they might do in case of an *actual* mortgage or assignment of it. There seems to be a material distinction between separate property retained by, or limited to a feme covert, and a separate maintenance allotted to her. The object, in the former case, is to enable a woman, though under coverture, to exercise the same power in the disposition of her estate, as if she were single. The object, in the latter case, is to enable a woman to live separate from her husband: therefore the same principle, *viz.* "to execute the intent of parties," that would induce a court of equity to support a fair agreement for a purchase of an equity or trust in the former case, would be an inducement for it to refuse its assistance in the latter case. The intent then, being clearly, that a feme so circumstanced should receive the separate maintenance from time to time, and not that she should have any power of disposing thereof; it seems, therefore, very questionable, whether the surety, in the

[* 105.]
Huime v. Tenant, et ux.
Brown's Ca.
Chan. vol. i. 16.

[* 105.]

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[* 107.] case of *Corbet* and * *Poelnitz*, would, even in equity, have had any relief against the Baronefs; for that must have depended upon whether that court would have deemed the original contract, such a one as it ought to establish and carry into execution; for if the court would not have established it in favor of the obligee, by decreeing him a satisfaction of the bond out of the trust estate, there would have been no consideration to support an equity to charge the fund in favour of the surety, whose only claim must be to stand in the place of the obligee, and to have the relief that *he* would otherwise have been entitled to. Lord *Hardwicke*, in the case of *Grigby* and *Cox*, said, that he should have had great difficulty in carrying the agreement in that case into execution, or establishing that purchase; because, *that sort of transaction was generally contrary to the intent*; for, where a feme covert was to receive rents and profits to her separate use, the friends of the wife *meant not* that she should make a *sale* of it, but receive it from time to time. This reasoning would apply much more strongly in the case of a separate maintenance; in which case the object of the settlement is, *expressly*, that of a continuing *maintenance*, which a sale *totally* defeats.

Vide Supra;

[* 108.] * But if the contract between the Baronefs *Poelnitz* and *Chambers* had been of such a nature as a court of equity would have supported, the proper mode for the surety would, in my opinion, have been to have applied to a court of equity: for then, *Corbett's* having discharged her from a suite in equity by *Chambers*, by paying the money, might have been considered as a good consideration whereon to found a decree against her, that the surety should stand in the place of the principal, and be indemnified, what he had paid, out of her separate maintenance. And, when a court of equity furnishes ample relief, there seems *NO reason* why a court of law should *extend* its power by overthrowing both *the soundest principles* and *clearest precedents*, merely because the parties have mistaken the remedy.

44 E 3. 33.
Bro. tit. Oblig.
74. et vide
Rothwell v.
Widrington,
3 Vern. 456.

An agreement entered into by a feme covert, jointly with her husband, for the benefit of her estate, will bind her: as if baron and feme bind themselves in the penalty of one hundred pounds, to pay one hundred marks to W. S. for a release from him of all his right in the lands of the wife. If W. S. release, and then
the

the husband die, the wife * shall be bound notwithstanding her coverture; *because the release was for her advantage.*

[* 109.]

At common law, an husband, likewise, is under a moral incapacity of entering into any agreement with his wife, they being considered as *both* constituting but one individual person; whereas there must be two persons capable of reciprocally assenting to constitute a contract.

But in equity, a man may, as between himself and his wife, make an agreement or declaration of trust; which, though not for valuable consideration, will take effect as against him, and any claiming voluntarily and in representation under him.

Vide Att. Gen. v. Whorewood, 1 Ver. 538, 539. Augier v. Augier, infra. Ward, v. Bowyer, Finch's Rep. 56.

Thus, where a husband agreed that his wife should take two guineas of every tenant that renewed a lease with the husband, beyond the fine which the husband received; this was allowed to be the wife's separate money.

Calmady v. Calmady, cited 3 P. Will. 339.

And if a feme covert lend her husband money, saved out of an allowance arising * from an agreement between herself and her husband; the court of Chancery will consider her as a creditor against him, and his representatives, to that amount.

[* 110.]

Thus, where it was proved that the husband allowed his wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from his farm, over and besides what was used in the family, for her own separate use, and by way of pin-money; and it was proved in the cause, that when any one came to buy fowls, &c. he would say he had nothing to do with those things, they were his wife's; and that he also had confessed, he had been obliged to borrow a hundred pounds of his wife, to make up a sum to compleat a purchase: it was decreed that the wife after the death of the husband, was well entitled to claim this 100^l. as a creditor: the Lord Chancellor observing, that courts of equity had taken notice of and allowed feme coverts to have separate interests by their husband's agreements, and that this 100^l. being the wife's savings, it seemed but reasonable encouragement to her frugality to allow it her; especially as there were no creditors to contend with.

Stanning v. Style, 3 P. Will. 335.

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[* 111.]

Gorges v. Chan-
cey, cited 1 Co.
Ch. 118.

* And the wife may, in such case, dispose of her savings by will. Thus, in the case of *Gorges and Chancey*, where baron and feme by agreement separated and lived apart, and stipulated that the wife should have 150*l.* per ann. separate maintenance, out of which she saved some money, and put it out to interest, and took bonds in a friend's name for it, and disposed of the money by will: it was, upon debate, established to be a good disposition for a valid consideration.

Vez. 539.

And such agreement will also take effect against the husband's executors and administrators, and all claiming voluntarily or in representation under him. Thus in a case before Sir *Joseph Jekyl*, relating to lady *Cowper's* estate, several gifts, made to her by Lord *Cowper* in his life, were established to belong to his lady, and to pass by her will.

Beard v. Nut-
hall, 1 Vern.
427.

So where A. after marriage, entered into a voluntary bond to settle a jointure of a given value on his wife; and died, after which the jointress was evicted; the court of Chancery, on a bill filed by the wife, decreed her to retain so much of the husband's personal estate against his representatives, as would *make up the deficiency in her jointure, notwithstanding the bond was given after marriage, and voluntary.

[* 112.]

Rofs v. Rofs,
1 Ca. Chan.
171.

Tenant in tail agreeing that others shall enjoy his tail lands, will be bound thereby; and Chancery will, in execution thereof, decree him to levy a fine, and settle the lands accordingly.

A cestuique trust of an estate may, by his assent to an agreement to which the trustees are no parties, bind them and his interest therein.

Lord Cornbury
v. Middleton,
1 Chan. Ca. 173.
203.

Thus where A. seized of the King's moiety of the New River water in fee, conveyed the same to trustees, upon trust for himself and his wife during their respective lives, and afterwards upon trust that they should, out of the rents and profits thereof, pay his debts and portions for his daughters at certain days, and then to permit B. the heir of A. and his heirs, to take and receive the rents and profits. A. and his wife died: and then B. contracted with C. for sale of part of the shares of the said moiety for 7000*l.* part to be paid immediately,

mediately, and the rest at a future time. * Afterwards S. contracted with B. by articles under hand and seal, for the whole moiety ; and then B. and his wife, and the *only acting* trustee, executed a conveyance to C. according to the articles. Afterwards C. filed a bill to have the articles carried into execution ; and notice of the articles entered into with C. being proved on S. it was then insisted for the latter, that there was no ground to decree the agreement made with C. it being made by a cestuique trust of the surplus only, and the trustees no parties, but on the contrary, one of them swearing that he disapproved of the contract, and would never consent to it. *Et per curiam*, C. had the first agreement, and S. the second, and equity ought to decree with the first ; for an interest in a trust is in equity assignable ; and he that may transfer, may covenant that his trustees shall do it.

[* 113.]

But it had been otherwise, if all the trustees had joined in a conveyance to S. without notice.

Having, in the foregoing part of this chapter, submitted to the reader the observations that have occurred to me on the right which is vested in individuals to bind themselves, by their assent to any contract or * agreement, so as to render themselves responsible in law, or in equity for its performance, I shall next call the attention of the reader to the consideration of who are persons capable of contracting, and binding, both themselves and others, by their assent to contracts and agreements.

[* 114.]

Churchwardens are a corporation, and, as such, are morally competent to assent to a reasonable contract or agreement beneficial for the parish ; and, thereby, to bind the parishioners and their successors, and also succeeding churchwardens.

Thus, an agreement made by the churchwardens of a parish, that the five o'clock bell in the morning should not be rung ; in consideration whereof the parties, inconvenienced thereby, covenanted with the churchwardens to erect a new cupola, clock and bell ; was specifically decreed and enforced by an injunction, not to ring the bell during the lives of the parties who had erected the cupola, &c. pursuant to the agreement.

D. Martin et
ux. v. Nutkin,
2 P. Will. 266.

The heir of a copyholder, whose father purchases a
K manor

Greenwood v.
Hare, 1 Ch.
Rep. 144.

[* 115.] manor for lives, will be decreed * to carry into execution an agreement made by the father to surrender and assign the same for a valuable consideration, if the father die before that be done.

Baden v. Countess of Pembroke, et al.
2 Vern. 213.

So an ancestor, seised in fee, may by his agreement bind his heir. Therefore if A. agree to sell lands, and receive part of the purchase money, and before any conveyance made, die; his heir, on a bill brought against him, will be decreed to convey, and the money will go to the executors; especially if there be more debts due, than the owner's personal estate is sufficient to pay.

Per Lord Hardwick, Pre. Ch.
640.

And the rule, in equity, is the same, where the estate is in borough *English*; there the youngest son will be decreed to convey as customary heir.

And a court of equity will, even when the ancestor is only tenant for life, decree a specific performance of an agreement made by him against the heir; where that agreement, at the time of its being entered into, was clearly advantageous to the heir.

Chetwynd v.
[* 116.]
Fleetwood, et al. 4 Brown,
Earl, Ca. 435.

Thus where A. seised of lands worth 1300*l.* a year, subject to a mortgage of * 5000*l.* previous to his marriage, viz. in 1714, settled them on himself for life, remainder, as to part, for securing a jointure of 400*l.* a year to his wife, with remainder, as to other part, to trustees, for a term of years, to raise 2000*l.* for younger children, remainder in strict settlement, remainder to his own right heirs. And afterwards, not having issue, in order to secure his estate to his niece B. C. and her issue, and having occasion for 1000*l.* in May 1725, came to an agreement with C. her husband, that C. should pay the mortgagee 274*l.* 19*s.* for interest on the 5000*l.* and also the growing interest thereof, and indemnify A. against the same, and also pay him 1000*l.* (all which sums were to be repaid with interest) and should also pay 5000*l.* as A. by deed or will should direct. In consideration whereof, A. agreed to settle and convey, charged as above mentioned, and, in pursuance thereof, did, by indenture of lease and release, bearing the date of the 1st and 2d of June 1725, convey and assure his estates to C. and W. deceased, and their heirs, to the use of A. for life, remainder, as to part, subject to the jointure of 400*l.* *per ann.* and to the terms for raising the younger children's fortunes, and the estate tail, limited by the deed

of.

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of 1714 to trustees, for * the term of 500 years from the death of A. to raise thereby 5000*l.* to be applied as A. should, by will or deed appoint; and also to raise all monies that A. should pay in discharge of the mortgage or interest thereon; and, from and after the determination of this term, to the use of C. and B. his wife, father and mother of W. C. for their lives, remainder to their children as they should appoint; and, for want of appointment, to W. C. for life, remainder to his first and other sons in strict settlement, &c. remainder to the right heirs of A. And, as to the residue of the estates, after the death of A. to the use of C. and W. and their heirs, in trust, by sale or otherwise, to raise money to pay the 1000*l.*—274*l.* 19*s.* and all monies paid for interest or principal of the 5000*l.* mortgage and all monies which C. should have advanced or paid for A. and, after payment thereof, to the same trusts as the other part of the estates were limited to: with a covenant from C. to pay the 5000*l.* and interest, and to indemnify A. against payment thereof; and a covenant from A. that, in case he should leave issue of his wife, his executors or administrators should repay C. all money advanced by him.

[* 117.]

* By indenture dated the 3d of the same *June*, C. demised to A. certain hereditaments for 99 years, for securing the payments of the mortgage and interest, and indemnifying him therefrom.

[* 118.]
Ibid.

C. paid the interest of the 5000*l.* but paid no part of the principal, and died intestate on the 5th Feb. 1731, without having made any appointment, leaving neither real nor personal assets to make good his covenant; and his wife died in *March* following. There were issue, W. C. the eldest son an heir, and H. C. and B. C. all then infants.

Ibid.

C. being dead, and not having left assets, and all the children being infants, and their guardian refusing to interfere, and A. being called upon for payment of the 5000*l.* and interest, and the estate conveyed to him being incumbered to the full value, prior in time to the conveyance to A. and he being thereby brought into difficulties, he exhibited his bill in Chancery for a specific performance of the agreement; or that, on payment of the sums advanced by C. and re-conveyance of the estates contained in the deed of the 3d of *June*, the indentures of the 1st and 2d of

Ibid.

June

- [* 119.] * *June* might be delivered up, and the estates be re-conveyed to A. or as he should direct. The infants, in their answer said, that they did not know whether it was for their benefit, that the agreement made between A. and C. should be performed, or that the 5000*l.* and interest, should be paid out of the real estate of W. C. the eldest son and heir of C. or out of the rents thereof. On a reference to a master, he reported, that A. was of about the age of seventy-one, and that S. his wife was of the age of forty-three ; that they had not any issue living, nor had *had* any for upwards of twenty-one years past ; and that the estates of A. were of the annual value of 1180*l.* and were then worth, to be sold, 30,000*l.* and that the infant was then of the age of sixteen years, and was, from the death of his father, entitled to a real estate in possession, of the clear yearly value of 2640*l.* and upwards, subject to the raising of 8000*l.* and that there had been already saved out of his estate 3000*l.* then in the hands of the accountant-general, besides a considerable sum in the hands of the receiver, not accounted for ; and that as A. was so far advanced in years, and had not, nor was there any probability of his having issue, and that as, whatever should
- [* 120.] * be paid out of the infant's estate for the 5000*l.* and interest, would be secured to him with interest by the assignment of the mortgage, and by the estates vested in C. and W. in trust to be sold, and would continue part of the infant's personal estate ; and, as his personal estate was not then sufficient to pay off the principal and interest of the mortgage, the master conceived, that it would be for the infant's benefit, that the arrears and growing payments thereof should be paid out of his personal estate ; and that it would be likewise for his benefit, to pay off both principal and interest on the mortgage, as soon as his estate should be sufficient for that purpose. Whereupon, Lord *Talbot* decreed the infant to carry into execution the agreement between A. and his father.

Ibid.

The infant W. C. became of age in November 1741, and immediately appealed to the house of Lords from this decree and the proceedings thereon ; suggesting, that he was neither executor nor administrator, to his father, and that he claimed no part of his personal estate, or any part of his real estate, *except* what was settled upon him by strict settle-

ment,

* ment, and in which his father had barely an estate for life, that determined on his death; and that therefore he was not bound to fulfil his father's covenants. And, in case the court should compel him to a specific performance of this agreement out of his own estate without his consent, he would be in a worse condition by having been an infant at the time of hearing, than he could have been if of full age, since it could not be pretended that the court would have made such a decree against him, had he been of age, without his own express consent to it; that should he be obliged to pay the mortgage money, interest, and costs, which then amounted to 7850*l.* or thereabouts, he could not be repaid any part of it, or any interest for his money, till after the death of A. who, though very old, was healthy, and might live several years; the money advanced by his father, and now due to his administrator with interest, amounted to 4850*l.* and, if A. was then dead, these two sums, with the 500*l.* he had power to charge, making together 17,700*l.* must be raised by sale of part of the estate in question; and, supposing the same to be worth 32,000*l.* according to the master's report, what would remain of the estate would be worth no more than 12,300*l.* * in which, by the settlement, the infant could have no other estate than for life, chargeable with 400*l.* *per annum* to A.'s wife, who was little more than fifty years of age, and very healthy. From all which calculations, it would evidently be of prejudice to the infant to carry this agreement into execution; and that if the uses of the settlement had been truly represented to the master, so that it had appeared upon his report that the infant was only tenant for life, it was apprehended the court would hardly have made such a decree, or declared it to be for the infant's benefit to perform the agreement. But the reasons already suggested in the master's report being replied, and it being observed in addition, that it would not make the agreement on the whole less reasonable in itself, or more advantageous for A. than the infant happened to be only tenant for life of the estate, since this was evidently intended for the purpose of preserving the estate longer in the infant's family, and he being very young, would, according to the course of nature, probably enjoy the estate a great many years after A.'s death. Besides the infant's father had a power of limiting the inheritance of the estate to the infant, if he had thought proper to exercise that power.

Thereupon

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[* 123.] * Thereupon the appeal was dismissed, and the decree, orders, and reports, complained of, affirmed.

Higlier v.
Sturman,
1 Vernon 210.
Vide Basker-
ville v. Basker-
ville, et ux.
2 Vern. 448.
1 Roll Abr.
351. F. 1. et
vid. 19 Mod.
160, 161, 243.

A mother may likewise, acting as administratrix to her husband, bind her children.

And the covenants of a woman, made *before marriage*, bind her after taken husband. Thus if, upon a treaty of marriage, by articles between A. father of the intended husband on the one part, and B. the intended wife on the other part, A. covenants that, in consideration of the marriage had, and of payment of a portion of 2600*l.* he will settle his estates in manner therein stipulated, and B. covenants for payment of the portion; and the marriage be had, and then it fall out that part of the portion is so circumstanced that it cannot be had; and, thereupon, A. refuses to perform his part of the agreement, unless the portion be paid; the husband will be compelled, by decree, to make up the deficiency of the portion, though he be no party to the articles, his wife having, *whilst sole*, covenanted for payment thereof, and, consequently, bound him, after marriage, to perform that covenant.

[* 124.]
Mason v. Ma-
son, cited Mose-
ly 224.

* In the case of *Mason and Mason*, where a mother, who was both jointress and guardian, but had no power by her jointure to sell timber, entered into articles for the sale of timber to the value of 1000*l.* these articles were carried into execution in equity.

Treat. Eq. 34.

It being a maxim in law, that the real estate of a feme covert shall not be bound without a fine, no agreement of the husband alone to part with the wife's inheritance will bind the wife, or be carried into execution in equity. But if the wife, upon a private examination, consent to an agreement by her husband to convey her lands, the court of Chancery will decree it. But the bill for this purpose must be filed against both husband and wife; for the wife ought not, by law, to convey by any compulsion from the husband, which it will otherwise be intended that she does.

Ibid.

But if a feme covert agree to sell her inheritance, so as she may have part of the money, and the land be accordingly sold, and her part of the money put into trustee's hands: this money is not liable to the husband's debts, though she afterwards agree that it shall be

be * so; nor shall any promise made by the wife for that purpose, subsequent to the first original agreement, be obliging in that behalf.

[* 125.]

Tenant in tail cannot, by agreement to convey for valuable consideration without fine or recovery, bind his issue in tail or the remainder men; because the issue in tail claim *per formam doni*, from the creator or author of the estate tail; and, therefore, a court of equity, though the issue are in the power of the tenant in tail to be barred by a particular assurance, that not being had, cannot take away the right they derive, not from the tenant in tail, but from the author of the estate.

1 Lev 238 239.
2 Vent. 350.
Hob. 203.

Thus where A. tenant in tail, agreed that B. and his heirs should enjoy the entailed lands, provided A. and his heirs might enjoy B.'s copyhold lands; and the agreement was executed, and a decree was obtained against A. to levy a fine; and A. died in contempt for not doing it, and his issue entered on the entailed lands, whereupon a bill was filed to compel him, to execute the agreement; it was adjudged that the issue was not bound thereby.

Ross v. Ross,
Ca. Ch. 171.
S. L. Powell v.
Powell, Pre.
Chan. 278.
Sangen v. Williams, cited
G. l. Rep. Eq.
164.

* But, if the issue enter upon the land, and accept of the agreement, it shall bind him; because by entering upon the recompence which his ancestor received for the estate tail, he makes himself a party to the original agreement, and is, therefore, bound in conscience to perform it.

[* 126.]
So adjudged in
Ross v. Ross,
supra.

And a distinction is taken between cases where the lands are entailed *de facto*, and those where there is only an agreement to entail; for, though the agreement raises an equity against him that makes it, yet that equity is the creature of the court of Chancery, to be governed by it as conscience directs; therefore if a man, being tenant in tail in equity, bargain and sell his estate, the court will decree such disposition good against the issue; for, to this purpose, they construe their own creature as a fee simple conditional before the statute *de donis*, which became absolute by the having issue, and the donee whereof had thereby the power of alienating it.

Vide 1 Ch. Ca.
234, 235. Finch.
128.

Vide 1 Vern.
14, 2 Vern.
132, 133, 183.
2 Vent. 327.

It seems that, upon the same principle, the heir in tail of a copyhold, whose ancestor had entered into an agreement to sell, but had died before surrender, would, in a court of equity, be decreed to convey to

the

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[* 127.] the purchaser ; * for the entail of a copyhold remains as it was, at common law, and is not within the statute *de donis*.

Bro. Contract.
26, 111 Rep. 50.
10 ph. 194.

And, as tenant in tail is restrained from aliening the estate without fine or recovery, so is he restrained from charging it, or disposing, by contract or agreement, of the lasting improvements after his death. Therefore if tenant in tail article for sale of the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail ; for if he die before they are cut down, his issue shall have them as part of the inheritance, and the vendee shall not be permitted, after the death of tenant in tail, to fell one tree, though it be half cut down : for, as the tenant in tail has power over the inheritance but during his own life, he cannot delegate that power to another but during the same time ; and consequently, whatever remains part of the inheritance at the death of tenant in tail, at which time his power over it ceases, must necessarily go to the heir to whom the inheritance belongs.

Vide 10 Mod.
469.

[* 128.]

But if tenant in tail, having a power to make leases for three lives, covenant to make such a lease, and die before execution ; it is * said, that a court of equity would carry this into execution against the heir.

Per Cancell.
2 P. Will. 197.

The executors of every person are implied in himself, and bound without naming.

Johnson v.
Ogilby, 3 P.
Will. 277, S. C.
2 Eq. Ca. Abr.
31. Pl. 40. Et
vid. 5 Brown's
Par. Ca. 547.

An attorney, having an authority, undertaking for and on behalf of his client, may bind him by an agreement, and will not *himself* be liable in case of non-performance. Thus if, previous to a trial, and just before it is to come on, the parties come to an agreement relative to the matters in question, and the attorney of the plaintiff or defendant alone sign the agreement for or on behalf of his client ; a court of equity will hold this binding on the client, but will dismiss a bill for a specific execution against the attorney.

Parrot v.
Well's, et al, 2
Vern. 127.

But where an attorney prevented a person indebted from applying to his creditors to compound his debts, telling him, " that he need not trouble himself to go to his clients, for they would be governed by him, and would make no agreement without him, but what agreement he made they would stand by," and he thereupon agreed, on their part, for a certain composition, in consideration whereof the securities should be delivered

OR AGREEMENTS.

ered * up, on performance by the debtor of his part of the agreement and refusal of the creditors to abide by the contract of their attorney, he was, upon a bill filed, decreed to indemnify the former according to the terms of the agreement.

A general authority to a steward to make contracts with the tenants, will not bind the lord without his consent and approbation, unless part of the bargain be actually executed.

It is said that, if a joint-tenant enter into an agreement to alien, and neglect so to do, and die, a court of equity will not, by its decree, compel the survivor to perform the agreement. But this position must be taken with this limitation, that the articles are not such as amount to a severance of the jointure in equity ; for, if they be, the court will decree against the survivor.

In the case of *Musgrave* against *Dashwood*, a copyholder for life, where, by the custom of the manor there was a widow's estate, agreed, That J. S. should hold and enjoy during his life, and the widowhood of the woman that he should leave at his death : after the death of * the copyholder, a bill was filed against the widow to have this agreement performed. But the court dismissed the bill with costs, saying, that if such contracts for copyholds should be decreed, the lords would be defrauded of their fines.

But Lord *Hardwicke*, in the case of *Hinton* and *Hinton*, over-ruled the foregoing case, so far as it extended to deny such a decree, where the agreement was for a valuable consideration paid as to the greatest part : or where the vendee had performed, or was ready to perform his part of the contract. This was a bill filed for a specific performance of an agreement for a sale of a copyhold (and *that to the exclusion of the widow's free bench*) by a father to his son for valuable consideration, paid as to the greatest part, the father dying before an actual surrender. And Lord *Hardwicke* was of opinion, that by analogy to the determinations at law in similar cases, where the husband had actually parted with the estate, in which cases the widow lost her free bench, upon the ground *that the free bench estate of the wife was but a branch out of the estate of the husband*, the wife should, in equity, where there was

[* 129.]

Per Lord Chan-
Cowper, 5 Vin.
Abr. 522. Pl.
35.

Vide 2 Vern;
63.

Per Lord
Hardw 2 Vez;
634. et vid.
1 Inst. 59. p.

Musgrave v.
Dashwood,
2 Vern. 45, 53;

[* 130.]

Hinton v. Hinton, 2 Vez.
631, 638.

Vide Renning-
ton v. Cole.
Noy, 29 Ber-
son v. Scot,
Salk. 185.
Freeman 516.

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[* 131.] an agreement, be bound thereby ; * for it was, in equity, a parting with the whole estate : then that court, considering the thing as done from the time at which it ought to be done, considered the vendor as a trustee for the vendee, and that those who came in *his* place ought to perform his agreement. And his lordship decreed a specific execution against the widow.

Thirdly, We are to consider in how many ways an assent may be given to a contract or agreement.

An assent to a contract or agreement may be either express or tacit.

An express assent is declared by some sign ; as gesture, speaking, writing, &c. and, in some cases, by solemn professions before magistrates, public registering, or the like. And such assent may be either precedent, concomitant, or subsequent.

A tacit assent may arise in several ways.

It may be inferred from inaction or forbearance of acting. Thus a man by his silence, in case he be present, and acquainted * with what is doing, is supposed to give his assent to what is then done ; unless it appear that he was awed into silence, or any ways hindered from speaking.

[* 132.]

As if a prior mortgagee witness a subsequent mortgage-deed without giving notice of his claim ; this act is considered as a tacit assent that his own security should be postponed.

So if A. make a lease for years to B. upon good consideration, and afterwards he make a lease to C. of the same land for the same time ; and B. drive the bargain, and be witness to the second lease, and do not discover this lease to C. and it be not excepted in the second lease, and the second lease be upon good consideration : in this case the second lessee will, even at law, be preferred.

Again, where a mother, to whom a term was limited in tail, stood by at a treaty for the marriage of her son, and heard him declare, that the term was to come to him after her death, and was a witness to the deed whereby the son took upon him to settle the reversion of the term expectant upon his mother's decease

Clare v. Earl of Bedford, cited
2 Vera. 151.
1 Will. Rep. 393.

Shep. Prac. Counf. 482.
Pl. 9.

Hunfden v. Cheyne,
2 Vern. 150.
1 Eq. Ca. Abr. 355. Pl. 7.

cease

* cease on the issue of that marriage, and did not mention or insist that she had more than an estate for life therein : on a bill filed by the issue of the marriage against the mother, praying that the issue should have the benefit of the marriage-settlement, and that the mother should make it good as to the reversion of the term after her decease ; it was so decreed, notwithstanding she insisted that she was ignorant of her title, and knew not that she, as tenant in tail of a term, might dispose of it, and that she was no party to the marriage agreement, nor concerned in it.

[* 133.]

And where A. upon his marriage with E. settled the lands in question, of which he was only tenant in tail, upon her for her jointure ; and B. the younger brother of A. who was heir to the entail, was privy to the treaty, and ingrossed the jointure deed, but concealed the entail ; and afterwards A. died without issue, and B. having the deed of entail in his custody, brought his ejectment, and recovered at law ; E. filed her bill for relief, and B. by his answer, confessed the facts above stated, and that he had the deed of entail then in his hands, but did not mention his title, nor discover the deed, because * he apprehended his brother would dock the entail. The court decreed, that E. should hold and enjoy her jointure against B. and all claiming by or under him ; which decree was affirmed on appeal to the house of Lords.

Raw, et ux. v.
Pole, 2 Vern.
239.

[* 134.]

And, in such cases, assent is presumed, even against an infant ; for it is meant as a punishment for his concealing his right, by which an innocent person is drawn in to advance his money, &c. Thus the court of Chancery granted a perpetual injunction against a mortgagee, who had engrossed a settlement, and not discovered that he had such a mortgage upon the estate ; and yet the mortgagee was an infant at the time he engrossed the deed.

Barnard. Rep.
102, 103.

But, in order to warrant us in concluding from a man's silence that he has relinquished his right, two things are necessary. The first is, That he should know that what belongs to him is conveying to another, for, when one forbears to act through mere ignorance, it can have no effect. Upon this principle Lord *Hardwicke*, in the case of *Welford* and *Beezley*, said, that he did not think the bare attesting a deed as a witness

Welford v.
Beezley,
1 Ves. 6.

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[* 135.]

Becket v.
Cordley,
Brown's Rep.
Chan. 357.

witness could create such a * presumption of his knowledge of the contents, as to affect him with any fraud ; because a witness was only to authenticate an instrument, and not to be presumed privy to the contents. And Lord *Thurlow* declared himself to be of the same opinion in the case of *Becket* and *Cordley*, for, that, in such case, the property was bound upon the principle of notice, and a witness, in practice, was not privy to the contents of a deed.

Secondly, That he should be voluntarily silent, tho' he has full liberty to speak ; for if there be any compulsion, that hinders him from acting, there is no ground, from his silence, to conjecture an assent to what is going forward.

The former principle governs in a court of law in cases where a lessee for a year holds over ; for in such case he is not considered as a tenant at will, but as a tenant for a year ; the law presuming, from the lessee's silence, a tacit agreement to renew the contract upon the original terms.

Vide *Tindal* et
[* 136.]
al. v. *Brown*,
Term Rep.
vol. i, fol. 167.

So if the holder of a note, when it is dishonored, omit to give reasonable notice to * the indorser, that he looks upon him as liable, and intends to resort to him ; he will be considered as agreeing to discharge the indorser, and to accept the maker ; for the omission of that information amounts, in law, to a tacit assent to give credit to the maker, and is tantamount to an agreement to discharge the indorser.

Many instances of this kind occur in cases, where, to give effect to some great leading contract, founded upon an express agreement, some other tacit agreement must, from the very nature of the transaction, be included therein. Thus if a man bargain with another for the sale of his trees, the law implies that the vendee shall have free ingress and egress to take them ; because, otherwise, the former agreement would be to no purpose. So he who lets a chamber, is presumed to consent that the lessee shall make use of such other parts of the house as are necessary to give him free access to this apartment, and free passage from it. And if a man give leave to another to lay pipes of lead thro' his lands, the law infers a tacit agreement, that he may dig the ground to lay them there.

Godbolt 358.

And

And there is one species of tacit agreement * which runs through, and is annexed to all contracts, conditions, and covenants; namely, that if one of the parties fail in his part of the agreement, he shall pay the other party such damages as he has sustained by such neglect or refusal.

[* 127.]

Thus where, on payment of 262*l.* 10*s.* by A. to B. the latter agreed to transfer five shares in the *Welsh* copper mines at the opening of the books, and for security gave A. a note in these words, "18 *August*, 1720, I do hereby acknowledge to have received of A. 262*l.* 10*s.* as a consideration for the purchase of five shares, which I do hereby promise to transfer to the said A. as soon as the books are open, being five shares in the *Welsh* copper mines. Witnesses my hand." The books were opened, when A. requested B. to transfer these shares, which he refused, and told A. he might take his remedy. A. brought an action upon the case for money had and received to his use. The chief justice left it to the consideration of the jury, whether they would not make the price of the stock, as it was on the day when it should have been delivered, the measure of the damages, which they did, and gave the plaintiff but 175*l.* damages. And, on a case made for the consideration of the court of * Common Pleas, it was resolved that the verdict was right, being not for the whole money paid, but for the damages in not transferring the stock at the time, which was a loss to A. and an advantage to B. who was a receiver of the difference to the use of A.

Dutch v. Warren, M. 7 G. 1.
C B cited
8 Burr. 1011.

[* 128.]

So if one usually send his servant to market upon trust, and, when he takes up goods, stand to the bargain; this is evidence of his assent that all the world should trust him; and may be applied by a jury to evince an assent to any particular contract.

There is also another kind of assent that may be considered as tacit or presumptive, though it be purely imaginary. This is where a person doth not think, nor indeed can think, of the engagement he enters into, because he is ignorant on what it is founded; yet he is still surprised to acquiesce in it, because we presume that, if he knew the thing, either he would consent to it as beneficial to himself, or should consent to it according to the maxims of natural equity.

Upon this principle, the law, upon every feoffment, release,

[* 139.] lease, surrender, gift, grant* or assignment, vests the property thereby conveyed in the feoffee, releasee, surrenderee, donee, grantee, &c. his assent thereto being presumed, it appearing *prima facie* to be for his interest.

So the heir's acceptance of an inheritance descending to him is presumed.

Smith, et al. v.
Nessen, et al.
Term Rep.
vol. 1, 269.

Again, if the persons upon whom a bill is drawn, refuse to accept upon account of the credit of the indorser, but pay the bill for the honor of the drawer: this raises an assumpsit, founded upon a tacit agreement, upon which an action for money paid, laid out, and expended, may be maintained against the drawer.

So if the husband turn his wife out of doors, this, in law amounts to a tacit assent to give her credit for necessaries; and, upon that ground, subjects him to an action as before stated.

Fourthly, I shall consider what circumstances invalidate an assent given.

Ignorance or error, in some cases, renders a contract or agreement invalid, by invalidating the assent given to it by one of the parties.

[* 140.]

* In this respect a distinction is made, where the person lying under the error or mistake, was drawn in to contract by fraud and circumvention, practised by one of the parties in taking advantage of the other's ignorance of his right, or concealing it from him; and where that proves to be an error or mistake respecting the thing or subject bargained for, equally unknown to both parties: for, in the former case, the contract or agreement will be null and void in itself; because, in all bargains, where the nature of the thing contracted about, and all its qualities, good and bad, are explained, and conceived to be understood, the assent is yielded under an idea, that the facts are strictly as stated.

Broderick v.
Broderick, 1 P.
Will, 239. S. C.
4 Vin. Abr. 534.
S. L. 1 Vern.
19, 20.

Therefore, where one devised his lands away from his heir at law, but did not execute his will according to the statute of frauds, and afterwards the heir at law, in consideration of 100 guineas paid him by the devisee, did, by deed, *reciting that the will was duly executed*, release to the devisee all his right to the estate devised, and then the heir at law being told by the devisee that, there being debts appointed by the will to be paid, it would facilitate the raising the money for the payment of debts, if he (the heir) would
join

* join in a lease and release of the devised premises ; [* 141.]
 whereupon, for 50 guineas more paid to him, the heir,
 together with the devisee, by lease and release, convey-
 ed the premises to J. N. and his heirs, in considera-
 tion of 4000*l.* mentioned to be paid by the purchaser.
 And a receipt was given for the money, but, in truth,
 the purchase money was not paid, but J. N. was a trust-
 ee only for the devisee, and so admitted to be. A
 bill was filed by the heir at law, to be relieved against
 these assurances. One witness swore, that the heir did
 declare to him, that the will was not worth any thing ;
 and that this declaration was made by him, before his
 executing the release. *Per curiam.* Either *Suppressio*
veri, or *suggestio fa'li*, is a good reason to set aside any
 release or conveyance : then, to recite in a deed that
 the will was duly executed, when it was not, was *sug-*
gestio fa'li, and to conceal from the heir that the will
 was not duly executed, was *suppressio veri*. So that both
 circumstances concurred. And as to the declaration
 of the witness, it was said, it was not to be believed,
 that, if the heir had known that the will was not duly
 executed, he would for so small a consideration, have
 parted with his estate and the court relieved the heir.

* But if it plainly appear that there was no inten- [* 142.]
 tion of fraud in either of the contracting parties, and
 that the one had no more knowledge of the thing con-
 tracted about than the other ; there, if, in a doubtful
 point, one party mistake, it is so much the worse for
 him ; but the contract is valid notwithstanding ; for
 the assent is complete and full to treat upon the sub-
 ject as it stands.

Thus it was laid down by Lord *Macclesfield*, in the
 case of *Cann and Cann*, where two parties were con-
 tending in the court of Chancery respecting an estate,
 and one released his pretensions to the other ; that
 there could be no colour to set this release aside, be-
 cause the man that made it had the right ; for by the
 same reason there could be no such thing as comprom-
 ising a suit, nor room for any accommodation : eve-
 ry release supposed the party making it to have a right ;
 but this could be no reason for its being set aside, for
 then every release might be avoided. That, there-
 fore an agreement entered into upon a supposition of
 a right, or of a doubtful right, though it afterwards
 came out that the right was on the other side, should
 be binding ; and the right should not prevail against
 the

Cann v. Cann.
 1 P. Will. 726.

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[* 143.] the agreement of * the parties, for the right must always be on one side or the other ; and therefore the compromise of a doubtful right was a sufficient foundation of an agreement.

Pullen v. Read-
y, 2 Atk. 587.

So where one devised his estates in remainder, after an estate limited in tail, in trust for his niece E. and her sons and daughters in tail, and went on, “ *Item, It is my will, and I do hereby declare, that if the said S. and M. (two daughters of E.) or either of them, shall hereafter marry with any person or persons whatsoever without the consent of their father and mother, and the trustees named in the said will, or the greater number of them living, signified under their hands, then it is my will, that such of the daughters, so marrying, shall have and receive no more benefit and advantage by my said will, or any thing therein contained, than if they were actually dead, or not named in my said will, either by particular names or daughters in general.*” E. the mother had three daughters. R.—S. and M. afterwards M. married without consent, and then a lawsuit arose between the sisters and their husbands as to the fortunes of the wives. And then articles of agreement were

[* 144.] entered into and executed between all the * parties, by which, among other things, it was agreed, that, after the death of E. the mother, who, was then tenant in tail, an equal division should be made between the daughters of all the estates belonging to the testator. Afterwards R. one of the daughters, and her husband, objected to M.’s having any share of the testator’s estate upon the ground that she marrying without consent had forfeited her right in the third of what was to come to her upon the death of her mother, and in order to get rid of the agreement, insisted that they executed the articles under a mistake. Lord Hardwicke said, that there was nothing more mischievous than for a court of Chancery to decree a forfeiture after an agreement, in which, if there was any mistake, it was the mistake of all the parties to the articles, and no one of them was more under an imposition than the other ; and he decreed them to be carried specifically into execution.

Pusey v. Dis-
bouverie, 3 P.
Will, 316.

But in such cases the parties must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, or otherwise the inclination of courts seems to be that they shall not be bound. Therefore where one, being a free-

man

O R A G R E E M E N T S.

* man of *London*, and having a wife, a son, and a daughter, compounded with the wife as to her customary part; and then made a will, giving, *inter al.* 10,000*l.* to his daughter, upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of *London*, or otherwise, and made his son executor, his daughter being about the age of twenty-three years. And the daughter, after having been informed by her brother that she had an election to have an account of her father's personal estate, and to claim her orphanage part, elected the legacy, and executed a release of her share under the custom. Lord *Talbot*, on an application by her after taken husband to set this lease aside, on the ground that her customary share would have been 40,000*l.* was induced so to do; because his lordship said, he hardly thought she knew she was entitled to have an account taken of the personal estate of her father, in order to ascertain what her orphanage part would amount to, and that when she should be fully apprized of that, then, and not till then, she was to make her election; for probably she would not have elected to accept her legacy, had she known or been informed what her orphanage part amounted unto before she waived it and accepted the legacy.

[* 145.]

[* 146.]

Under the head of Contracts, under an ignorance that does not invalidate the contract for want of consent, we may class Wager Contracts, to the validity of which it is not essential that the event be in itself contingent. For here it is sufficient that the event be equally uncertain to the parties.

Therefore, where an action was brought to recover money won upon a wager, whether a decree of the court of Chancery would be reversed or not on an appeal to the house of Lords. And it was objected, on motion in arrest of judgment, that the contract was void; and one ground urged against it was, because the event was not contingent; but certain, for the laws of this country were clear, evident, and certain. All the judges knew them, and, knowing them, administered justice with uprightness and integrity. The event therefore, was certain, and of course the wager such as in its nature was impossible to be lost. *Sed per curiam*: this contract is equal between the parties; they have each of them equal knowledge or equal ignor-

Jones v. Ransdall, Cowper
37.

[* 147.]

ance : it is concerning * an event which, reasoning by the rules of predestination, is to be sure so far certain, that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties, whether the house of Lords would be of the same or a different opinion with the chancellor. The presumption, if any, rather against the person betting in opposition to the chancellor's judgment.

[* 148.]

Here we may likewise consider those cases, in which agreements are made for the purchase of estates, and the like, which estates are afterwards found, in circumstances, to have been erroneously represented to the purchaser. In these cases a distinction is made according to the nature of the circumstances mistaken, or respecting which there is error. If the mistake be respecting *that*, at which the person making the contract particularly aimed, the agreement will be void, his assent being founded on the ground, that the thing in which the error lies existed, or was wanting. Any deviation from the terms of the contract in these respects, is, therefore, essential. But, if the error be in some circumstance, which, although the purchaser would have been better pleased with his bargain had it existed, yet he did not * particularly aim at and specify in his contract; here the bargain will be good, and the defect will lie in compensation: for the existence, or non-existence of this circumstance, does not appear to have been considered as an essential motive to the assent given; and then the gist of the contract is the value of the thing contracted for, which, in case of any variation, may be equalized by deducting the difference of value out of the purchase money.

As for example, suppose a man contracted and agreed to sell an estate, and in his description stated it to be tythe-free, and it afterwards turned out to be subject to tythes; if it were not evidently the intention of the party contracting for the purchase that it should be tythe-free, so as that were the express motive to his assent, the being subject to tythes would not invalidate the agreement; for, whether it be so or not is an accident, and has nothing to do with the essence of the contract: it is considered, therefore, as not affecting the assent to purchase, but merely as giving the vendee a right to call upon the vendor for an abatement of price, in proportion to the inconvenience or diminution of value, that the being tythable occasions.

* So if a man were to agree to purchase an estate upon a particular, in which it were stated to consist of a manor, lands, &c. and it turned out that the manor belonged to another person, and not to the vendor. The bargain would nevertheless, be carried into execution, in equity, subject to an abatement in price, according to the value at which the manor was estimated. And, yet, it may be very material in the consideration of the purchaser, whether he, or another person, be lord of the manor extending over his estates. But such circumstances are, nevertheless, considered, in equity, as laying in compensation merely. [* 149.]

To put this principle of equity, in a still stronger light. Suppose an estate with a manor were sold by a particular, specifying the value of each part, and wherein the manor were thrown in as a make weight, and on a valuation taken, at the instance of the vendee, the estate were valued, without the manor, at the sum stipulated to be paid for it with the manor; and it turned out that the manor was in another person, and not in the vendor: in such case it appears to me, that the bargain ought to be carried into effect, in equity, without any deduction from the sum * stipulated for the purchase. For, considering the ground upon which the parties contract, the vendee is no loser by the deficiency. The contract still remains equal upon their estimation. [* 150.]

But if the buyer make it an express condition in the agreement for the purchase, that the lands be ~~ty~~-free, or that there be a manor, and the seller covenant therein to that effect; then unless the fact turn out as stipulated, the contract will be null.

And, in some contracts, the intention of the parties, as to the nature of their assent, will be inferred from circumstances; as from price, or the like. Thus if a man sell a horse for a price, which it could not be worth unless it were sound, the contract will be void, If it turn out otherwise; for the purchaser would never have consented to give a sound price, unless he were to have a sound horse.

This principle is illustrated by the writers on natural law by a very apposite instance, namely, that of a female slave clothed in the dress of a man, and offered to be hired or sold in that character.

[* 151.]

* *In such case the difference of the sexes is only to be known by their habits, and, consequently, cannot be mistaken, unless under a disguise. And, therefore, the hirer must be supposed to have consented to the agreement, under the assurance that the servant was of that sex whose habit she wore, and then the error is essential, and consequently, the bargain is null and void.*

OF THE SUBJECTS OF CONTRACTS OR AGREEMENTS.

HAVING shewn what persons are capable of contracting, or being contracted with ; we are necessarily led, in the next place, to consider the subjects respecting which contracts may be entered into, and in what respects men may lawfully bind, or oblige themselves by their words, or bargains.

And it is observable, upon this branch of our enquiry, that a distinction subsists between contracts that are executed, and such as are executory. For it is a known rule of law, that a man cannot by contract, executed, grant or convey any thing, in which he has not an actual or potential interest, at the time of the grant or conveyance ; because it is necessary that he, who by his contract makes another possessor of any thing, should first be, himself, the proprietor of it. In our law, therefore, every contract executed, respecting a subject of which the party * conveying is not owner, actually or potentially, at the time of entering into it, is void. Thus, if a man grant all the wool that shall grow upon his sheep, that he shall buy *hereafter*, this is a void grant ; for he has the wool neither actually nor potentially.

So if one make a lease of lands to another, and the lessor has, then, no interest in the lands leased ; it is a good plea for the lessee to say, “ that the lessor had nothing in the lands *at the time of the lease*.”

Upon the same principle, if one grant unto another a rent-charge out of white acre, and that it shall be lawful for the grantee to distrain in all the other lands whereof the grantor is then seized, and in those which he shall *thereafter* purchase ; although this be but a liberty of distress, and no rent, except out of white acre, yet the clause is void, as to the lands to be purchased afterwards.

So, if a reversion had (when attornment was in use) been granted to J. S. and afterwards J. D. (a stranger) had, by his deed, granted to J. S. that, if he (J. D.) purchased

Plowd. 131.

[* 153.

Hob. 132.

Co. Litt. 41. E.

Bac. Max. 78.

Ibid.

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[* 154.] *purchased the particular estate, he would attorn to the grant; this had been a void attornment, notwithstanding J. D. had afterwards purchased the particular estate.

Co. Litt. 3c9.b.

Upon the same principle, it is laid down by lord *Coke*, that if, before the 4. *Ann*, cap 16. sect. 9. the conusee of a fine, previous to attornment, had bargained and sold the feigniory to another; the bargainee could not have distrained; and the reason is, because the *grantor* could not have distrained; *and no man can transfer more right to another man, than he has himself.*

Flowd. 432.

Again, if one, being possessed of a horse, sell the horse to another, upon condition that he pay forty pounds for it at *Christmas*: the contract being completed as soon as the price is agreed upon, he cannot, afterwards, and before *Christmas*, sell it to a third person. Nor will such latter sale be made good, though the first vendee fail of payment, by reason whereof the vendor re-seizes the horse; because, at the time of the second contract, the vendor had neither interest, nor property, nor possession of the horse, but only a condition, which will not enable him to contract * for the property and possession; therefore, it is merely a void act.

[* 155]

Bac. Max. 78.

And if A. grant unto B. that if B. enter into an obligation to A. of 100*l.* and afterwards procure him *such a lease*, then the same obligation shall be void. And B. enter into such an obligation unto A. and afterwards procure such a lease, yet the obligation is simple; because the defeazance was made of that which was not.

19 H. 6. 62.
a 64. a Bro.
Grant. 40.

So if A. grant to B. by deed, that if B. make unto A. an obligation for any sum, it shall be void; and afterwards B. enter into such an obligation to A. the grant is void; because it is the grant of a duty that A. had not in him at the time of the grant; and every man may bind himself to what he pleases.

Dyer, 221. Pl
18.

Nor will the law allow a man to grant or incumber that in which he has only an inchoate title, or interest to be perfected in future. Thus, if a writ of annuity were granted by a prebend, after collation, admission, and institution, but before installation or induction; such a grant, though it were confirmed by the ordinary, he

he being the patron, * would be void ; because the prebend had but *jus ad rem* and a future interest, and not *jus in re* ; for he cannot be said to be a prebendary to all intents, nor at the common law, without the real possession, which is given him by induction. [* 156.]

But we must distinguish the last-mentioned case from those cases in which, although it be uncertain whether the thing granted will ever exist, and it, consequently, cannot be *actually* in the grantor or certain, yet it is in him *potentially*, as being a thing accessory to something which he *actually* has in him ; for such *potential* property may be the subject of a contract executed, as a grant, or the like. Thus a parson may grant all the tithes that he shall have in such a year, yet, perhaps, he shall have none ; for the right to the advowson, &c. is in him, and out of *that* advowson they arise. So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then in *esse*. Upon the same principle, a lord of a manor may part with the profit of his courts for a time to come. 22 H. 6. 43.

This principle was investigated and * confirmed in the case of *Grantham* against *Hawley*. There, one seized of land, let the same by indenture for twenty-one years, and covenanted therein that it should be lawful for the lessee, his executors and assigns, to carry away to his own use, such corn as should be growing upon the ground at the end of the term ; and afterwards the lessor assigned his reversion. And one question was, whether the lessee was entitled to corn so growing ? and it was argued on the part of the assignee of the reversion, that it was merely contingent, whether there should be corn growing upon the ground at the end of the term or not ; and that the lessor never had property in the corn, and, therefore, could not give nor grant it ; for the right to the corn, standing at the end of the term, being certain, accrued with the land, to the lessor. But judgment was given against the reversioner : because it was said, that the property, and very right of the corn, when it came into being, was passed away ; for this was both a covenant and a grant ; and, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Then, though corn were *fructus industrialis*, [* 157.]
Grantham
v. Hawley,
Hob. 132.
to

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[* 158. * so that he that sowed it might seem to have a kind of property *ipso facto* in it, divided from the land, and, therefore, it would go to the executor, and not to the heir ; yet, in this case, all the color the reversioner had to it was by the land, which he claimed from the lessor who gave the corn ; and, though the lessor had not the corn actually in him, nor certain, yet he had it *potentially*; for the land was the mother and root of all the fruits. Therefore he that had that, might grant all fruits that might arise upon it afterwards, and the property would pass as soon as the fruits were extant.

And where contracts are executory, operating as declarations precedent, and to the perfection of which some new act or conveyance is necessary to give them life and vigor, the law admits of them, although made before any interest vested.

Facon's Max.
79.

As if a man covenant with J. S. by indenture, that before such a day he will purchase the manor of D. and before the same day levy a fine of the same land, and that the same fine shall be to certain uses which are expressed in the indenture. This indenture * will bind the land, though it be purchased after ; because there is a new act to be done, namely, the fine.

[* 159.]

Pac Max. 80.

So if I grant unto J. S. authority, by my deed, to demise for years the land whereof I am now seized, or *hereafter* shall be seized, and after I purchase lands, and J. S. my attorney, demise them : this is a good demise, because the demise of my attorney is a new act, and all one with a demise by myself.

Ibid. 79.

But if there were no new act to be done, then it would be otherwise : as if a man should covenant with his son, in consideration of natural love, to stand seized unto his use of the lands which he should afterwards purchase, the use would be void. And the reason is, because there is no new act, nor transmutation of possession following, to perfect this inception, for the use must be limited by the feoffor, and not by the feoffee, for the feoffee has no interest at the time of the covenant.

Ibid. 80.

So, if A. mortgage land, and afterwards covenant with J. S. in consideration of money which he receives from

from him, that after he * has entered for the condition broken, he will stand seised to the use of J. S. and A. enter, and this deed be enrolled, and all within the six months yet nothing passes; because the enrolment is no new act but a perfective ceremony of the first deed of bargain and sale; and the law is more strong in this case, because of the immediate relation that the inrolment has to the time of the bargain and sale, at which time the bargainor had nothing but a naked condition.

So, if there be two joint-tenants, and one of them bargain and sell the whole land, and before the inrolment his companion die, nothing passes of the moiety accrued by survivor:

Another observation opposite to this part of our subject is, that the right of disposing, being a right commensurate with and correlative to property, cannot be extended beyond the ability of the party contracting to dispose; because it is vain and impertinent to contract about matters which are unattainable. It follows from hence that no right can be created, nor obligation be incurred, from a contract to perform things naturally impossible. And, therefore, were * one man absurd enough to covenant with another to build him a large house in a day; or to go to Rome in the same time; or to overturn Westminster Hall with his finger; or to make the Thames overflow Westminster Hall; or to drink up the sea; or touch the sky with his hand, or such like impossibilities: such contracts would be void; and the party, undertaking to accomplish them; would be subject to no action, even for damages accruing by reason of non-performance:

But we must distinguish here, between things naturally impossible; and the impracticability of accomplishing of which must be evident to all parties at the time of contracting; and things which are not physically impossible, but the impossibility of accomplishing of which arises from circumstances peculiar to the party contracting; for, in the latter cases, although the main contract be of necessity void, by reason of the inability of the person undertaking to perform it: as if a man contract to sell an estate, the title to which is in another person: yet, though equity will not enforce a specific execution, that will not discharge the person contracting to sell, from paying damages to the other party for any loss he may sustain by reason of his

N

being

[* 160.]

ibid. Gro. Jac. 53

Bro. tit. faité

[* 161.]

37. Et vide
Fitzh. Oblig. 3
Puffend. lib. 3.
sec. 2. Et ibid.
note 1, 40 E. 3.
6. a.

Cornwall
v. Williams,
Colles's Ca. 1a
Part. 117.

[* 162.]

being imposed * upon; for although, where a person covenanting through remissness and negligence, undertakes an impossibility, so far as goes to his capacity of performing, the main undertaking must be void; because, *that the thing stipulated is practicable to the party stipulating to perform it*, is presumed as a tacit condition in the contractor's mind in every agreement; the law, nevertheless, upon account of the neglect and default of the undertaker, binds him to answer any damage that the other party suffers through his being disappointed, but not to any damages as a *compensation for the non-performance of the thing contracted for itself*, that, as being impracticable to the party, not requiring any.

Thornborough
v. Whitacre,
2 L. Raym.
1164 S. C.
6 Mod. 305.

Thus where A. in consideration of 2s. 6d. in hand paid to him, and of 4l. 17s. 6d. to be paid to him upon his performance of the agreement, contracted to deliver to B. two grains of rye-corn on the *Monday* following, and so on progressively, doubling the quantity on every *Monday* during the year: it was objected, on an action on the case brought upon this agreement, that it appeared upon the face of it, to be impossible, the rye to be delivered amounting to such a quantity as all * the rye in the world was not sufficient to produce. *Sed per curiam*, if a man will, for a valuable consideration, undertake a thing impossible *with respect to his ability*, that will not make the contract void; for though the contract be a foolish one, yet, it will hold in law, and the person so contracting ought to pay something for his folly, and the cause was compromised on re-payment of the half crown with costs.

[* 163.]

And where the term "*impossible*" in its *physical* sense is applied to an agreement, it is to be taken in its fullest extent; and, therefore, a man may bind himself to do any thing, which is not strictly impossible, and the law will hold him to the performance of it. The legal distinction, therefore, between a near and remote possibility, is not regarded in executory contracts. And, therefore, if A. covenant with B. that, in case he die without issue, he will give his lands in D. to his brother; a court of equity will carry this agreement into execution, upon the contingency happening, *although a limitation in a deed "after dying without issue" would be void*. So a covenant to settle lands, of which a man has only a possibility of descent, will

will be carried into execution * in equity : for a decree of that court does not attach upon the *interest* in the land stipulated about; but the court enforces the performance of the *agreement in specie*, by its *process* against the *person* to compel him to execute it.

[* 164.]

And the subject of every contract must not only be a thing naturally possible to be accomplished, but it must also be *morally* so; for to give an agreement an intrinsic obligatory force, and fit it to produce an action in courts of justice, it is not enough that it be made with the consent of both parties, but the subject of it ought to be such a thing, as men have a *lawful* right and power of stipulating about at their pleasure. Therefore, to make an agreement truly obligatory, it is requisite that the party undertaking, have a *moral*, as well as a *physical* power, of performing the thing agreed upon. It follows, that an engagement to do a thing in itself unlawful must be void; for it would be absurd that an obligation, which derives its sanction from the law, should put us under a necessity of doing something which the law prohibits. All acts, therefore, undertaken against legal constitutions, are, by virtue of the law, null and void upon two grounds; namely, first, * because where the object of a contract is contrary to a man's duty, it may be presumed that he did not give his full and free assent, especially if it be to perpetrate any crime, as murder, theft, or perjury. Secondly, because the law, by forbidding it, takes from the contractor the power of obliging himself to do it, and, by consequence, prevents the person contracting from gaining any right of requiring it to be done. It becomes, therefore, necessary for us in order to have a clear conception of the law of England as to the subject of contracts, to consider in what respect matters or things are said to be against law.

[* 165.]

Matters or things, against law, may be said to be so in *two* senses; *viz.* First, in a proper; Secondly, in an improper sense.

All matters or things, against law, in a proper sense, are reducible under three heads.

Vide 1P. Will.
189.

First, either to do something that is *malum in se*, or *malum prohibitum*.

Of the first kind, are all contracts that have for their object something forbidden by the eternal immutable

OF THE SUBJECTS OF CONTRACTS

[* 166.] able laws of nature and of God : * as to commit murder, theft, perjury, or the like ; which contracts acquire no additional turpitude, from being declared unlawful by any legislature.

Fitz. tit.
Oblig. 13.

Therefore if I be under an obligation to pay you 20*l.* if you kill or rob such a person ; this is a void obligation, and creates no right.

Co. Litt. 206. b.

The second denomination of contracts, void on the ground of being contrary to law, *viz.* those that are *mala prohibita*, applies to things, which, though they be not *mala in se*, or contrary to the law of God and nature, yet are bad as being against the law of the land ; because they are either repugnant to the welfare of the state ; or against some maxim or rule in law ; or in contradiction to some positive statute.

Alleyn 67.

Among the first of this description, namely, of such as are repugnant to the welfare of the state, all contracts or agreements, that have for their object a restriction of trading in any particular way in general throughout *England* are ranked ; all such contracts being void, as militating against national policy, one great object * of which is, and ought to be, to encourage and promote trade, and, consequently, to invalidate all contracts that have a tendency to check or restrain the exercise of it.

[* 167.]

Upon the same principle, namely, to prevent any stipulations that have a tendency to discourage trade, every contract, that has for its object a general restriction not to exercise a trade within a limited period of time, is likewise void. Therefore if a dyer enter into an agreement not to use his craft for two years, it will be void ; for such restraint must not be total, although it be temporary only.

2. H. 5. 5. b.
Bro. tit. Oblig.
85.

31. Co. 53. b.

So if a husbandman be bound not to sow his land ; the bond is against common law.

But the same objection does not apply to an agreement, not to trade in any particular place ; for the policy of the nation is not concerned in what place a man exercises his calling. And there may happen instances wherein such a contract may be useful and beneficial : as to prevent a town from being overstocked with any particular trade : or in the case of an old man, who, perceiving himself under such circumstances

stances of body or * mind, as he is likely to be a loser by continuing his trade, will find it better to part with it for a consideration, that, by selling his custom, he may procure to himself a livelihood, which he might probably have lost by trading longer.

Therefore it has been held, that an assumpsit may be maintained upon an agreement not to keep a mercer's shop in *Newport*: for the undertaking is voluntary, and the party restrained, may, notwithstanding, keep a mercer's shop elsewhere.

But a contract of the latter kind will not be binding, unless entered into for a good and sufficient consideration; for if it be without consideration, it will be void.

And it is best that such good or sufficient consideration should appear upon the face of the contract: because, wherever such contract stands indifferent, and, for aught that is known, may be either good or bad, the law presumes it *prima facie* to be bad. First, in favor of trade and honest industry. Secondly, for that there plainly appears a mischief, but the benefit can be only presumed, and in that * case, the presumptive benefit shall be overborne by the apparent mischief. Thirdly, for that the mischief is not only private but public. And, fourthly, for that there is a sort of presumption, that it is not of any benefit to the obligee himself; because it being a general mischief to the public, every body is affected thereby: for it is to be observed, that though it be not shewn to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds on that reason; *viz.*, as taking away the obligor's livelihood, *which proves that the law presumes it.*

But Lord C. Just. *Parker* was of opinion, in the case of *Mitchel* and *Reynolds*, that where it did not appear on the face of such a contract, whether or no the contract were made upon good consideration, or were merely injurious and oppressive, that might be shewn by pleading: though certainly the case might be settled either way without prejudice.

And formerly a distinction was taken, in the case of such a contract for restraining the trading in a particular place, between a contract or promise upon good consideration,

[* 168.]

Broad. v. Jolly,
&c. Cro. Jac.
596. S. C.
2 Bulst. 136.
Jones 13.
Palmer 172.
Chesman v.
Nainby,
2 Strange 739.
1 P. Will.
181.
Alleyne 67.
Moor 115, 242.
Paim. 172.
March 17.
1 P. Will. 192.

[* 169.]

Mitchel v.
Reynolds,
1 P. Will. 192.

3 Lev. 242.
March 77. 193.
Moore Pl. 259.
379 2 Leon.
210. Nov 98.

[*170.] consideration, and *a bond or a covenant to pay a sum certain on breach of such undertaking; the former being held valid, and the latter, even although it were for a good consideration, void. The reason for which distinction was, that, in the former cases, the whole being to be recovered in damages, it was in the power of the jury to assess them according to the nature of the consideration, and the injury received; but, in the latter cases, the whole penalty or sum was forfeited, and might be recovered in an action of debt, whatever might be the consideration given, or however slight the injury received.

Mitchel v.
Reynolds,
1 P. Will. 321.

But, in the case of *Mitchel* and *Reynolds*, this distinction was over-ruled, upon the following grounds, namely, First, that a bond is a more favorable contract for the obligor than a promise; because the penalty is a re-purchase of the obligor's trade ascertained beforehand, and on payment whereof he may have it again, and a man may rather chuse to be bound not to do it under a penalty, than not to do it at all. Secondly, for that, however it be, it is the obligor's own act. Thirdly, because the obligor can suffer only by his knavery; and courts of justice are not *concerned lest a man should pay too dear for being a knave. Fourthly, Because restraints, by the custom of particular places, may be enforced with penalties which are imposed with the parties consent, nay, where they are imposed by the injured party without the concurrence of the other; then, *a fortiori*, the obligor may bind himself by a penalty. And, fifthly, because the question, whether upon the consideration of the circumstances the contract be good or not, is matter of law not fit for a jury to determine.

[*171.]

And, in the consideration of these kind of bonds, entered into with a view to restrain persons from exercising their trades within particular districts, courts of equity advert to the object of the bond; making a distinction, where the penalty of the bond is merely intended as a security for the enjoyment of the object stipulated for, and where it is in the nature of assessed damages; and, in the former case, these courts consider the enjoyment of the object as the principal intent of the deed, and the penalty only as accessory, and to ensure the damage *really* incurred; to ascertain which, they direct an issue to try *quantum dam-nificatus*, and, thereby, give the same remedy upon a bond,

O R A G R E E M E N T S .

* bond, as might have been procured if the contract had rested upon a promise only.

This was done by the lords commissioners in the case of *Hardy and Martin*. There A. and B. had been partners as brandy-merchants; and, on A.'s quitting the business, and selling the lease and good-will of the shop to B. for 300. B. entered into a bond, in 600*l.* penalty, not to sell, for nineteen years, any quantity of brandy less than six gallons, within the cities of *London* and *Westminster*, or five miles thereof, nor to permit any person to do the same, &c. And upon a breach of this contract, an action was brought, and a verdict given for the penalty; whereupon the plaintiff filed a bill, praying that an account might be taken of the actual damage sustained by the defendant, and an issue directed for that purpose; and that, on payment of the damages, the defendant might be restrained from taking out execution for the penalty of the bond. And it was decreed accordingly.

The next instance that occurs to me of a contract void, as being *malum prohibitum*, as militating against the public welfare, is that of a bond, or an agreement for unlawful * maintenance; which is an unlawful upholding in a cause depending in suit by word, writing, countenance, or deed, and is void as being *inequum in lege*.

Upon the same principle a bond, taken by a sheriff for fees, is void: First, because the sheriff, by the common law, was to take no fees at all for discharging the duties of his office; and, therefore, whatever fees he is entitled to, being given by act of parliament, the act must be strictly pursued. Secondly, from the apparent probability, that sheriffs would make use of such bonds to support oppression.

And if a sheriff, or gaoler, take a bond of a prisoner with condition to be a true prisoner, or to pay for his meat or drink, such obligation is void; the law prohibiting it, as a means that might be made use of for purposes of extortion.

An obligation, entered into with an alien enemy, has been likewise held to be void; upon the ground, that a communication between the king's subjects and persons of that description, may endanger the public safety.

[* 172.]

Hardy v. Martin Brown's
Chan. Rep.
419. in note.
Et vid. *Er-
rington v.*
Auchley, Bro.
Chan. Rep.
1788. fol. 341*l.*

Carter 229.
2 Inst. 212.

[* 173.]

10 Mod. 139.
1 P. Will. 195.

Plowd. 68.
10 Co. 100 b.
12 Mod. 682.
Vin. Abr. tit.
Condition U.
Pl. 15.

Bro. tit. Oblig-
51.

And,

[* 174.]

* And, for the same reason, viz. *that they militate against the general welfare of society*, marriage brocage bonds, given for assistance in promoting marriages, are void; for marriage ought to be procured and encouraged through the mediation of friends and relations, and not by hirelings; and such bonds to match-makers, and procurers of marriage, are of dangerous consequence, proving the occasion of many unhappy marriages, to the prejudice and discomfort of the most respectable families. And, therefore, the consideration of such bonds and securities have always been discountenanced, and relief in equity been given against them, even so long since as the Lord *Coventry's* time, and long before: particularly in the case of *Arundell and Trevillian*, between whom an order was made in *February, 2 Car. 1.* in these words: "Upon the hearing and debating of the matter this present day, in the presence of the council learned on both sides, for or touching the bond or bill of 100*l.* against which the plaintiff, by his bill, prayeth relief; it appeared, that the said bill was originally entered into by the plaintiff unto the defendant for the payment of 100*l.* formerly promised unto the defendant by the plaintiff, *for the effecting of a marriage between the plaintiff and *Elizabeth* his now wife, which the said defendant procured accordingly, as his council alledged. *But this court, utterly disliking the consideration whereupon the said bill was given, the same being of dangerous consequence in precedent, upon reading three several precedents, wherein the court hath relieved others in like cases against bonds of that nature, thought not fit to give any countenance unto specialties entered into upon such contracts.* It is, therefore, ordered and decreed, that the said defendant should bring the said bill into court, to be delivered up to the plaintiff to be cancelled.

Arundell v. Trevillian.
1 Chan. Rep.
87. et vide *Hall v. Potter* Show, Parl. Ca. 76.

[* 175.]

And a decree, in favor of such a bond, was reversed in the house of Lords, in the case of *Hall* and others against *Potter*, reported in *Shower's* cases in parliament.

And the same principles that apply to contracts executed, as bonds or the like, extend likewise to assumpsits, and executory agreements. On which ground it is held, that all promises must have three qualities. First, they must be good and lawful. Secondly, they must

Show. Parl. Ca.
76.

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must be possible. And thirdly, they * must be certain, and of some signification, and not frivolous and nugatory.

First; where the consideration, which is the ground of the promise, or the promise, which is the consequence or effect of the consideration, is unlawful, the whole contract is void.

Thus, where the plaintiff declared, that, in consideration he (the plaintiff) would discharge the defendant from 2*l*. due from him to W. R. his master; he (the defendant) promised to lay out 40*l*. in repairing the plaintiff's barge: this was held a void promise, and the consideration deemed illegal; for the plaintiff could not discharge a debt due to his master.

And if a sheriff, for 10*l*. promise that a prisoner shall escape, this promise is not good.

So, if one that is a minister of justice, promise to do a thing that is unlawful in his office; or another promise to save him harmless in so doing; such promises are void: And, therefore, where A. had levied a plaint * in the *Stepney* court against B. and a precept to attach the goods of B. was directed to C. the bailiff. The bailiff attached corn in shocks, and delivered them to A. to re-deliver them at the next court, A. promising to save him harmless. It was held, that no action lay against A. for not saving C. harmless, *because the attaching the corn in shocks was unlawful*.

So a promise, *as well as a contract*, not to use a trade in a particular place is void, if it be without a consideration; and if it be a promise, that has in view a general restraint from using his trade, it is void, though there be a consideration.

And a promise to procure one to be instituted to a chapel, in consideration of 20*l*. paid to him, being simoniacal and against law, is void.

But, in cases where the unlawfulness of the consideration against which a person is indemnified, is unknown to that person, the promise founded upon it, will be binding. Therefore, if A. bring B. to a common inn, of which C. is the host, and affirm to C.

O

that

[* 176.]

1 Bullst. 38.

3 Salk. 97.

10 Co. 76. 102.
Dyer. 356.
Cro. Eliz. 199.

Meade v. Bigot,
1 Cro. 230.

[* 177.

Pragnell v.
Gosse, Allen
67. Stile 11. 2
Bullst. 135.

Mackallen v.
Todderick,
3 Cro. 337, 353.

Fletcher v.
Harcourt.
Hutt 53.
Wynch 42.

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[* 178.] that he has * arrested B. by virtue of a commission of rebellion; and *in consideration that C. will keep B. as a prisoner by the space of one night*, A. assumes and promises to save C. harmless. If B. recover against C. in an action of false imprisonment, C. may have an action against A. For though the keeping B. is unlawful, it does not appear to C. to be so.

Arundel v.
Gardiner, 2
Cio, 652.

And, where a plaintiff pointed out particular goods, and desired the sheriff to take them on a *fiern facias*; and, in consideration that the sheriff would take them, promised to indemnify him, this was held a good promise; for, the plaintiff shewing the goods, and requiring the sheriff to do execution, it was reasonable that he should save the sheriff harmless. And a promise to that purpose was held to be good.

Secondly; a promise must be possible to be performed.

Bendl. 59, 90,
139.

Therefore a promise to go to *Rome* in three days, is void. So is a promise, that a man in London shall cover a house in *Hampshire* while he is there in *London*.

[* 179.]
Co. Litt 206 b.
Perk. sec. 735.

* Upon this ground, if A. the 9th of *May*, promise to stand to the award of B. so that it be made before the 10th of *May* next, *and that A. have notice fifteen days before*, the promise is void.

So promises to be nonsuited, where there is no action; or to spare a piece of ground, where there is none such, are void.

1 Roll's Abr.
15, Pl. 6.

But, where the matter promised may be reduced to a certainty, though it be upon a condition that is impossible, the promise will be good, and the condition only void. As if A. be indebted to B. in ten pounds, and C. promise B. that, in consideration that he will forbear suing A. for the debt till such a day, he (C.) will, if A. does not pay him upon that day, pay him *upon the same day*; this is a good promise, upon which B. may have an action against C. For although A. has the whole day to pay it, and then it is impossible for C. to pay it upon that day, on default of A.'s not paying it upon the same day; yet, *the substance* of the promise being for C. to pay, *in default of A.'s paying*, and the time, limited for C. to pay being an impossible time, the condition, as to the time,

is

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* is void ; and then if A. omit to pay it at the day, [* 180.]
C. ought to pay it on request.

Thirdly. Promises, we have said, must be certain. And therefore if one promise to deliver goods, in consideration that the other promises to pay money *in a short time*, this promise is said to be void, *for uncertainty* as to the time : so, if A. promise to sell a horse to B. for the price *that B. shall value him at*, such promise would likewise be void.

But, where a man promises that he will pay a sum of money, and does not say when, it is a valid promise, and the money must be paid presently. 10 Co. 76, 102.

So, if A. promise to deliver B. goods, or make him a lease or the like, and no time is fixed when it shall be done, the promise is certain enough ; but the party has all his life-time to perform it in. 10 Co. 77.

And if A. be about the business of B. and B. promise A. that he will repay him whatever he lays out ; this is sufficiently certain. Het. 122.

Again ; if A. in consideration that B. will * marry his daughter, promise to give with her a child's part ; and that at the time of his death, he will give to her as much as to any of his children except his eldest son, this is a good promise ; for though a child's part is in itself altogether uncertain, yet the promise being to give *as much as to any* of his children ; it is certain enough, it being averred what the rest of the children had except the eldest. [* 181.]
Silvester's case
Popham, 148.

So it *was* held that where A. in consideration that B. would marry his daughter, assumed and promised to give B. twenty *French* pieces, this was a good promise ; for this, according to the usual speech at that time, should, it was said, be intended *French* crowns, which were the common coin of *France*, and known here. Pointer v. Pointer, Cro. Car. 194.

And if there be an assumpsit to enter into an obligation for performance of a thing of certain value, without mentioning in what sum, it shall be intended according to the value. 1 Syderf. 270.

So where, in an assumpsit, the plaintiff declared, that 1 Keb. 56, 65.

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[* 182.] that the defendant, in consideration, * &c. six months before the return of king *Charles* the second, assumed to pay 20*l.* to the plaintiff, if *Charles Stuart* should be king of *England* within twelve months thence next following: this was adjudged a good promise, and that it should be taken according to the subject matter, *viz.* That the king that was then out of possession, should be in possession within twelve months.

Pleas v. Palfrey.

2 Syd. 270

1 Keb. 776.

Hob. 69

1 Brownl. 4.

1 Mod. 70.

But where the plaintiff declared that, whereas there was a communication between the plaintiff and defendant concerning the bark of certain wood, and that thereupon it was agreed, that the defendant should give to the plaintiff ten shillings *per* seam for all the bark of such wood as the plaintiff should cut; and that the defendant assumed and promised to have ready upon a certain day, articles purporting the agreement, and an obligation for performance thereof, &c. the declaration was held not to be good; because it was not said in what sum the obligation was to be, and a certain sum could not be intended, because the number of seams were altogether uncertain.

[* 183.] All contracts and agreements, the objects* of which militate against the principles of morality and public decorum: as is the case with all such as are entered into, to give effect to corrupt purposes; are by the law of *England*, void, upon two of the grounds before alluded to, namely, as being repugnant to the welfare of the state, and also against the maxim or rule of law, which prohibits every thing which is *contra bonos mores*. Therefore, all contracts that are entered into with a view to evade the law, being in their nature immoral, are essentially vicious, and cannot be supported.

Per Lord Mansfield, Cowper 89.

Therefore, if a person, who wanted to be made a bishop, conversing with a person who had *most interest* at court, upon the subject of a see that was then vacant, were to say, *I will bet you so much* (naming a considerable sum) that I have not the bishopric. Such a wagering contract, *though innocent in itself*, if unaccompanied with any sinister view, yet, *being a mere color* to disguise the real intention of the party, namely, to purchase the bishopric, which is an illegal act, would be clearly and manifestly corrupt, and therefore void.

Upon

* Upon the same principles a wager, entered into *merely as a color to cover usury*, cannot be recovered by action at law; for the moment the truth appears, the contract, whatever shape it may assume, will remain to be governed by the same rule, as if the parties had expressly entered into the illicit and corrupt agreement itself.

[* 184.]
Ibid. 49.

And if a wager were made with one of the judges, or one of the lords who are to decide upon a cause; this operating as a bribe, would render the contract void.

And the same objection would apply to a wager, laid with a counsel or attorney on the adverse side, to induce him to act treacherously in the cause.

But a wager laid between the plaintiff and defendant in a cause, "whether a decree of the court of Chancery would be reversed or not on an appeal to the house of Lords," the parties being upon equal terms, and the contract entered into without fraud, and with a view only of securing something to the appellant in case the decision went against him, was held to raise a valid contract; as not * being prohibited by any positive law, nor against any principle of sound policy, or legal maxim.

Jones v. Randal, Cowper 37.

[* 185.]

All contracts that have a fraudulent object in view, are, *upon the same grounds*, void, both at law, and in equity.

Therefore where two sutlers to several regiments of militia (who as such were entitled to certain forage of oats and hay for divers horses daily out of the king's magazine belonging to the camp) entered into an agreement with the person who furnished and supplied the magazine, that the sutlers would abstain from taking the forage, or such part thereof, as they should think fit, and would leave the same to be the property of the person supplying them, and that he should pay and allow them $9\frac{1}{2}d.$ by the ration, for every ration to which they should be entitled, and which they should so leave at the magazine: this was held to be a corrupt agreement between the parties, as having for its object the cheating of government, by taking a composition for the forage of the whole number of horses allowed, *whether they were kept or not*, which was a clear fraud upon the public.

Willis v. Baldwin, Dougl. last edit. 450.

These

[* 186.]

* These principles, likewise, extend to all contracts of an unfair nature in respect of their influence on third persons, although *otherwise* as between the parties to them ; because, if their object be to impose on third persons, the parties to them cannot have remedy at law or in equity, for they are immoral.

Therefore a bill in equity for an allowance for attendance at auctions, to enhance the price of goods, will be dismissed with costs ; for equity will never give countenance to demands of such a nature.

Neither would such an agreement support an action at law.

The third head of exception, above alluded to, includes all contracts respecting things prohibited from being objects of contract by statute law.

Of this nature are all bonds given in opposition to the third branch of the statute of the 23 H. 6. cap. 10. made in avoidance of obligations taken in other manner than is expressed in that statute. Therefore if a sheriff let one, who is in his custody for suspicion of * felony, go at large upon his single obligation ; this obligation is void.

So if one be in the custody of the sheriff by a *capias* upon an indictment for a trespass, and the sheriff let him to mainprize : and he enter into an obligation to a third person, upon condition to keep his day, &c. and this be done for the surety of the sheriff : This obligation is void ; because the last branch of this statute prohibits any sheriff from taking an obligation for any cause aforesaid, or by color of their office, but only to themselves ; and then, inasmuch as it is taken to another, it is void.

And this statute extends as well to *promises* made under such circumstances, as to obligations. And therefore if a sheriff or gaoler, in consideration of the ease and enlargement of any person that is within his ward, take a promise to save himself harmless ; such a promise (although the statute speaks only of an *obligation* with condition) being in equal mischief, is void ; the words of the statute, *viz.* " And if the sheriff takes any obligation in any other form, that it shall be void,"
being

Treatise of
Equity 24.

37 H. 6. 1. b.
[* 187.]
10 Co. 100. b.
Bro. tit. Oblig.
37. Fitz. tit.
Oblig. 4.
7 E. 4. 5. Pl. 15.
Fitzh. Debt. 80.
Bro. non est
factum 14.
10. Co. 100. b.

Danby v. Heth.
cot, 10 Rep.
100. b. Vide
Cro. Eliz. 66.

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being * sufficiently comprehensive to bring *such a promise* within the *equity* of it. [* 188.]

So every agreement, contract, and security for more than legal interest is void, by virtue of the statute of the 12 Ann. stat. 2. cap. 16.

Therefore where L. declared against the acceptor W. on a bill of exchange, as indorsees of A. and B. to whom the bill was stated to have been indorsed by C. the drawer and payee ; and the defence was, that the bill was given upon an usurious contract between A.—B. and W. whereby more than legal interest was secured. It was insisted, in answer to this allegation, that the bill was indorsed to L. for a valuable consideration, and without notice of the supposed usury ; and contended, that, although it should appear that the original transaction was usurious, still W. was answerable to them. But it was determined, that no action could be maintained on a note so circumstanced ; for that the bill, in such case, was void at first ; and, then, a contract, void in its origin, could not be rendered valid by any thing done to it afterwards.

Lowe, et al.
v. Waller,
1 Term Rep.
736.

* So an agreement by a *bankrupt*, or *any person* on his behalf, to pay a sum of money to a creditor for signing his certificate, is void under the 5 Geo. 2. c. 30, sec. 11. The following case illustrates this proposition in both instances.

[* 189.]

A. having committed an act of bankruptcy, B. his chief creditor, took out a commission against him : but, afterwards, finding that no dividend was likely to be made, refused to sign his certificate. Afterwards, on frequent application, and earnest entreating, made by the bankrupt to O. a tradesman in town (who was an intimate friend of B. who lived in *Cheshire*) he (the tradesman) got O. to write to B. several times, and he at last prevailed upon B. to send him (O.) a letter of attorney, empowering him to sign the certificate, which O. would not do, unless the bankrupt, or somebody for him, would advance 40/. and give a note for 20/. more, which sum and note on O.'s signing the certificate for B. D. (who was the bankrupt's sister) paid and gave to O. accordingly, who, thereupon, gave a receipt for the money, promising to return it, if the certificate was not allowed by the chancellor. The certificate

Smith v. Bromley,
Douglass, 1st
edit. 696. in
note.

[* 190.]

icate was allowed, and * O. paid the money over to the creditor. And, on an action for money, had and received for D.'s use, it was contended on the part of B. that if D. had become security for her brother the bankrupt, before the act of bankruptcy, B. might have received the money of her without any imputation; and that, if a third person, afterwards, voluntarily paid what she might before have become bound for, without any injury to the bankrupt's other creditors, there was no iniquity in the creditor's taking the money, so as it did not amount to his whole debt. But Lord *Mansfield* was of a different opinion. His lordship said, that it was iniquitous and illegal in B. to take, and, *therefore*, it was so in him to detain this 40*l.* If a man made use of a means in his own power to extort money from one in distress, it was certainly illegal and oppressive; and, whether it was the bankrupt or his sister that paid the money, it was the same thing. The taking money for signing certificates, was either an oppression on the bankrupt or his family, or a fraud on his creditors. It was a thing *wrong in itself* before any provision was made against it by statute; for, if the bankrupt had conformed to all the law required of him, and had fairly given up his all, the * creditor ought in justice to sign his certificate: but, on the other hand, if the bankrupt had been guilty of any fraud, or concealment, the creditor ought not to sign, for any consideration whatever. If any near relation was induced to pay the money for the bankrupt, it was taking an unfair advantage and torturing the compassion of the family; if it was the money of the bankrupt himself, it was giving one creditor his debt to the exclusion of the others, and a fraud upon them. His lordship, therefore, thought it necessary, for the better support and maintenance of the law, to allow the action; for no man would venture to take, if he knew he was liable to refund. Where there was no temptation to the contrary, men would always act right.

[* 191.]

And agreements of this kind are void under the statute, although the money, stipulated to be paid, be for the benefit of *all* the creditors.

Thus where the plaintiffs, as assignees of a bankrupt, were entitled to the equity of redemption, of 149*0*l.** bank stock, which was in mortgage to L. for securing a sum of money lent by him to the bankrupt, and the defendant was desirous that this equity

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of *redemption should be assigned to L. by the plaintiffs, and that they should execute to L. a general release, of all claims and demands which they, as assignees, had upon him ; an agreement was entered into between the assignees and the defendant, " That, on " the bankrupt's having his certificate confirmed by " the lord chancellor, and the assignees assigning to " L. or any person he should appoint, so far as in them " lay, the equity of redemption of the capital stock " mortgaged to L. and also executing to him a general release of all claims and demands, which they, " as assignees, had on him, the defendant should pay, " and promised to pay (four months after the certificate should be confirmed by the chancellor, and " on the plaintiffs assigning the equity of redemption, " as aforesaid, of the said stock to L. or any person " he should appoint, and executing and delivering " such general release) the sum of 611/. to the plaintiffs, for the benefit of the creditors of the bankrupt." The bankrupt's certificate was allowed and confirmed, and an assignment of the stock prepared and tendered to the defendant for execution. But the defendant refused to execute it, saying, that he acted only as attorney for L. who would never *pay the money. It was proved on the trial, that C. (who was one of the plaintiffs, and was a most obstinate creditor, and by much the largest) was persuaded to sign, by being told, that, if he did not, the money would never be received. It was therefore objected, that this was an agreement to secure the payment of money due from the bankrupt, in order to induce a creditor to sign his certificate, and, therefore, void under 5 Geo. 2. c. 30. sec. 11. A verdict was given for the plaintiffs, with 611/. damages, but subject to the opinion of the court on a motion for a nonsuit. It was contended on behalf of the plaintiffs, that this agreement was not within the sense or intent of the statute. The object of that act, it was said, like that of all other bankrupt laws, was to procure an equal distribution of the bankrupt's effects among all his creditors ; that this general object ought to be kept in view in construing them all ; and that the agreement in this case, tended to secure an equal distribution, and, therefore, promoted the policy of the statutes. *Sed per Lord Mansfield.* It struck me in this case, at *Guildhall*, that the agreement was with the assignees acting for all the creditors, and the benefit to go to all the creditors. I

[* 192.]

[* 193.]

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[* 194.]

thought * that, between a friend of the bankrupt and all the creditors, any agreement might be made ; they might agree to supersede the commission ; they might agree to compound. But upon fuller consideration I am satisfied ; and the court is of opinion, that this case is within the letter of 5 Geo. 2. c. 30. and within the reason of it. Great corruption and oppression might arise from a combination of all the creditors, to exact conditions for signing the certificate.

Lewis v. Chase.
1 P. Will. 620.

But Lord *Parker* refused to extend this statute by construction to a case, which, *prima facie*, seems to be within the spirit, although it clearly is not within the letter of the act. In the instance alluded to, a bankrupt endeavored to be discharged with the consent of four-fifths of his creditors in number and value, and a creditor preferred his petition to the lord chancellor against the allowance of the certificate, upon which the bankrupt, in consideration of the creditor's withdrawing his petition, gave him a bond for his whole debt. And Lord *Parker* was of opinion, that this was a case out of the words of the statute ; for here the object was, to withdraw a petition against the allowance of the certificate, and * not to induce the creditor to sign the certificate, which was the mischief the statute was pointed at : and his lordship dismissed a bill to be relieved from the bond with costs.

[* 195.]

Again, all contracts for insuring lottery tickets are made void by the 14 Geo. 3. cap. 76.

Secondly, a contract is unlawful, in a proper sense, if the object of it be, *to induce the omission of something, the doing of which is a duty in the person with whom it is made.*

Norton v.
Simes, Hob. 12.
S. C. More 856.

As if a sheriff make an under-sheriff, *provided that he shall not serve executions above twenty pounds, without his special warrant* ; this proviso or agreement will be void ; for, though a sheriff may chuse not to make an under-sheriff at all, or may make him at his will, and so remove him, yet he cannot leave him an under-sheriff and yet abridge his power.

Ibid,

And in such cases the law is the same, whether the contract be contained in a covenant or in a bond ; therefore, on its being argued in the last-mentioned case, that the restraint of executions above twenty pounds
grew

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grew not* on the part of the sheriff, but on the part of the under-sheriff by his covenant, which might stand good, notwithstanding the repugnancy of his office ; it was answered, *that such a covenant was void as against law and justice* : for since, by being made under-sheriff, he was liable by law to execute all process, he could not, any more than the sheriff himself, covenant not to execute process without another's special warrant : for *that* would be to deny or delay justice.

[* 196.]

Thirdly, a contract or agreement is unlawful, in the proper sense, *if it be to encourage unlawful acts or omissions.*

Therefore, if the proprietors of a newspaper were to give the editor a bond of indemnity against any indictment or action, to which he might, thereafter, be subjected by reason of publishing libels, or the like ; such bond would be void.

So if one enter into an obligation to the sheriff to bear him harmless if he embezzle a writ. If the sheriff do so, and be damaged by the embezzling, yet he shall not take advantage of the obligation ; for it is void, because * he shall not be protected in doing an act contrary to law.

Fitz. tit. Oblig.
13.

Again, if one apply to a gaoler, and make him a promise grounded upon this consideration ; namely, that, in consideration that he will suffer one charged in execution for debt to go at large, &c. the debt not being satisfied, he shall be paid such a sum of money. This consideration is against law, and, consequently, the promise, founded upon it, is void by the common law, and gives no cause of action.

[* 197.]

Beathman
v. Martin,
2 Bull. 213.

And if the sheriff let one to mainprize who is not bailable, and take an obligation, it will be void by the course of the common law ; for, in such case, the letting him go at large is *a tort*, and a thing *contrary* to law, and then, the obligation is made to aid the sheriff in doing a tort, in which case it is void.

M. 37 H. 6. 1 b.
Fitz. Oblig. 4.
Bro. tit. Oblig.
37. 1 Lev. 209.
10 Rep. 100. b.
Dyer 324.

So if a man will take a bond, or other security, to be saved harmless of suffering one to escape ; or for enlarging one out of prison against law ; or to save one harmless if he kill such an one, or do such a trespass :

These

Dive vers.
Manningham,
Flowd. 60. 64.
Et vid. Dyer
118, 119.
2 H. 4. fol. 9.
Cro. Car. 353.
354.

[* 198.] These * contracts, upon the same principle, will be void.

M. 2 H. 4. 9. Again, where the plaintiff in replevin had a *withernam* out of the common pleas, by force whereof one of the sheriff's bailiffs took four oxen of the defendant's in the name of *withernam*, and afterwards delivered them to the defendant again, and the defendant became bound to him to keep him without damage concerning these oxen: the obligation was held to be void; for the writ of *withernam* was *capias in withernam*, &c. et ea detineas quo usque, &c. So that the sheriff ought to have kept the cattle, and not to have delivered them to the party; and then the delivering them to the party was a tort, and the obligation was made to aid him in that tort, and, therefore, void.

Upon the same principle, namely, *that the contract has a tendency to encourage unlawful acts*, a wager between two people, that one of them, or that a third person, shall do a criminal act, will be void.

[* 199.] Thus, if I lay you a wager that you do not beat such a person, and you lay that you * will, such a wager will be void; *because it is an incitement to a breach of the peace.*

So, if the subject matter of a wager were a violation of chastity, or an immoral action, "*as if one betted that he would seduce such a woman*," courts of justice would entertain no action upon such a wager, because it is an incitement to immorality.

But there is a distinction where a bond is to secure the obligee against a breach of covenants in an indenture, some of which covenants are void, and some of which are good, where the covenants are void at common law, and where by the statute law; for, in the former case, the bond will be good for the covenants that are lawful, and void as to the other covenants; but, in the latter case, the whole bond will be void.

Thus, in the before-mentioned case of *Norton* against *Simes*, though the covenant from the under-sheriff, as to not serving executions above twenty pounds without the special warrant of the sheriff, was void; yet, the covenant that the under-sheriff should discharge and save harmless the sheriff, of all escapes of prisoners,

Norton v.
Simes supra.
Hob. 12, 13.
Bro. tit. faits.
37. Moore 856.
Plowd. 68.

* prisoners, that should be arrested by him, or any bailiff or officers appointed by him, was held to be good, and the bond as to that valid ; it being lawful for the sheriff to take bond of the under-sheriff, to discharge and save him harmless of escapes upon arrests made by himself : for, since the sheriff transfers his authority unto the under-sheriff, it is reasonable that the former should take security of the latter, to perform all the duties justly and faithfully to himself and others. But if a sheriff take a bond for a matter against the spirit of the 23 Hen. 6. c. 10. and also for a debt due, the whole bond is void. The reason for which distinction is, *that such is the letter of the statute* : for a statute must be strictly pursued ; but the common law distinguishes according to common reason, and, having made that void, which is against law, permits the rest to stand.

And here it is necessary to observe, that, although contracts or agreements, respecting things *which the law prohibits to be the subjects of contracts*, create no right, and, consequently, occasion no obligation on either side, yet the law *suffers* them, in some instances, nevertheless, *after they have been carried into *execution*, to prevail contrary to its prohibition ; for *being executed* ; they are valid between the parties, *although the law will not give its aid to assist either party in carrying them into execution*. For the parties are looked upon to treat together as if there were no law about the matter and so to renounce the benefits which might accrue by the law to either of them. And therefore, though they do ill to engage themselves, they ought in conscience to suffer their engagement, *being executed*, to continue in force, and neither of them ought to break it without the assent of the other. As for example ; if I game with a man contrary to the law, and lose, I ought not to have recourse to law to recover my money nor use any forcible way to regain it, if there be no cheat put upon me by him that has won it.

In this view of the matter, prohibitions, enacted by positive law in England, in respect of contracts, are of two sorts. First, such as are founded upon general reasons, of policy, and public expedience. As where the act is in itself immoral, or a violation of the general laws of public policy. Secondly, such prohibitions as are intended to protect weak or necessitous men

[* 200.]

[* 201.]

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[* 202.] men from being over-reached, * defrauded, or oppressed. In the former cases, both parties offending are equally guilty ; in the latter, only one of them. The law, therefore, in the former cases, allows no action for the relief of the party who has performed his part of the contract, after he has assented *with full and entire liberty* : the law of *England*, in this case, corresponding with the maxim of the *Roman* law, "That if an agreement be dishonest, both in respect to him that gives, and him who receives, the first cannot require any thing again, because in this case the possessor has the advantage." Therefore, if one pay money fairly lost at play, and do not sue for the recovery of it within the time prescribed by the statute of Anne, c. 14. he is barred.

Vide Digest. lib.
12. tit. 5. de
conditione ob.
turp. & injust.
causam leg. 8.
2 Burr. 1012.
Ca. T. Talbot.
41.

So if a man, in cases of bribery, pay money by way of a bribe, he cannot recover it in an action ; because, both plaintiff and defendant are equally criminal. The prohibition in the lottery act, stat. 12 Geo. 3. cap. 63. falls within this distinction.

Vide Browning
v. Morris, Cow-

[* 203.]
per 290.

Upon the same principle no action lies for a lottery office-keeper for money paid by him to a person, in consequence of his having * insured a ticket ; this species of contract being prohibited by the 17 Geo. 3. cap. 46 : for the money being conscientiously due in honor and honesty, and paid, it cannot be recovered back ; both parties are in *pari delicto*.

Money paid upon a gaming policy is in the same predicament. It cannot be recovered back.

Lowry v. Bour-
dieu, Doug. last
edit. 468.

Thus, where L. had lent 2600*l.* to H., on a common bond, and, while he was at *China*, got a policy of insurance underwritten by B. and others, which was on the following terms : "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton* in *China*, &c. upon the said ship, &c. from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.* being the amount of H.'s common bond, payable to the parties as shall be described on the back of this policy, and it bears date the 6th day of *December*, 1775 ; and in case of loss, no other proof of interest to be required than the exhibition of the said bond ; warranted free from average, and without benefit of salvage to the insurer." At the head of the in-
surance

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* Insurance was written, "*on a bond as above expressed.*" H. returned from *China*, and arrived safe, none of the events insured having happened. Afterwards the insured brought an action for the return of the premium, on the ground, that the policy *being without interest*, the contract was void. But it was held by three judges against one that the policy was a gaming policy prohibited by the statute of 19 Geo. 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis*, was applicable to the case, and the plaintiffs, the risk being run and over, could not recover the premium.

But in the latter cases, namely, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished, may bring his action, and defeat the contract. For instance; by the statutes of usury, taking more than 5 *per cent.* being * declared illegal and the contract void, the borrower, if he pays the illegal interest, may recover the excess of the interest on an action: for these statutes were made, to protect needy and necessitous persons from the oppression of usurers and monied men, who were eager to take advantage of the distress of others; whilst they, on the other hand from the pressure of their distress, are ready to come into any terms, and with their eyes open not only to break the law, but complete their own ruin.

Another instance of this kind is the before mentioned clause in the stat. 5 Geo. 2. cap. 24. sect. 17. to prevent bad practices on bankrupts, who have not obtained their certificates, and who for the sake of obtaining it, will come into any terms themselves, and cause their friends to come into any terms, that a hard creditor may chuse to impose. Now on this statute, if the bankrupt or a relation, pay money to a creditor, who, in consequence signs the certificate, and then the bankrupt renews his trade, and receives every advantage that he can derive from having obtained his certificate: he may, notwithstanding, bring his action, and

[* 204.]

Vide *Browning v. Morris*, Cowper 791.

Bosanquet v. Dashwood, ca. T. Talbot 38.
[* 205.]

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[* 206.] and * recover the money back ; and this, though he has acted contrary to a law made for his own benefit : for, in these cases, the one party is urged by mere necessity to pay what the other ought not in justice to demand ; therefore the maxim of *volenti non fit injuria*, does not apply to him ; and then, he falls within the reason of the law, that, in order to prevent oppression and advantage from being taken of the necessity of others, has made it penal for him to take.

But if such illegal contract remain in an executory state, and be not executed ; there, if the party who has paid money as a consideration for something illegal to be done, wishes to rescind the contract, he may do so, for, so long as nothing is done by either party, each of them is free to recant ; because it is to be presumed, that they have not acted with mature deliberation. As if a merchant has promised another to furnish him with contraband goods, and they agree for the price, either may refuse to stand to this bargain, which ought not to have been made. * But then it can only be done on the terms of restoring the party to his original situation.

[* 207.]
Walker v.
Chapman,
cited Dougl.
last edit. 471.

Supra.

* Thus, where a sum of money had been paid in order to procure a place in the customs, and the place had not been procured ; the party, who had paid the money, brought his action to recover it back, and it was held that he should recover ; because the contract remained executory. So if the insured, in the before-mentioned case of *Lowry and Bourdieu*, had brought his action before the risk had been over, and the voyage finished, they might have had a ground for their demand ; but they waited till the risk (such as it was, not indeed founded in law, but resting on the honor of the insurer) had been completely run.

And in some cases the illicit nature of the subject renders the contract void, and in others it invalidates only the security. This distinction seems to have originated on the manner of wording the statutes against gaming, as applied to money lost, and money lent at the time and place of play.

Note. The statute 9 Ann. c. 14. makes the winning above 10l. at one sitting a nullity.

The statute of 16 C. 2. c. 7. s. 3 enacts, as to money, exceeding 100l. lost, and not paid down at the time of losing it ; “ that the loser shall not be compellable

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able to make it * good, but the contract and contracts *for the same* and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, shall be utterly void, &c." But the words CONTRACT and CONTRACTS *for the same*, seem to have been industriously avoided in the statute of the 9th Anne, c. 14. the words of that statute being, "that all notes, bonds, bills, judgments, mortgages, or other securities, &c. for money won or lent at play, shall be utterly void.

This difference in the wording of these statutes, and the cases decided thereupon, was held by the court of King's Bench, in the case of *Robinson and Bland*, to warrant that court in determining that, although, by these statutes, as well a contract for money lost at gaming, as the security given for such money was void, and, consequently, no action could be maintained for it; yet, that, as to money fairly lent at play, the securities only were void, the contract remaining valid; the genuine, true and sound construction of the 9th of Anne being "to understand it as intended to prevent * any securities being taken for money won at play, or lent to play with, when the borrower has lost all his ready cash; but not to make the contract itself void, where the money is fairly and *bona fide* lent, though at the time and place of play." And, accordingly it was held, that *an action upon the case on assumpsit* on the implied contract, lay to recover money lent by the plaintiff at the time and place of play, and for which a bill of exchange was then given, *the bill itself being a void security.*

The annuity Act appears to me, upon a full consideration of its several clauses, to furnish ample grounds for a similar construction. And, indeed, if the *province* of courts be to *expound* not to make the law, I cannot see any principle upon which this statute can be construed otherwise. For every section, except that which relates to the purchasing annuities from infants, expressly confines itself to the security *without meddling with the contract*. *Ex gratia*, The first clause requires, that "a memorial of every deed, bond, instrument or other assurance, whereby any annuity or rent-charge shall from thenceforth be granted for one or more life or lives, &c. shall, within twenty days of the

[* 208.]

Robinson
v. Bland.
2 Burr. 1077.

[* 209.]

17 Geo. 3 c. 26.

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[* 210.]

*execution of such deed * bond, instrument, or other assurance*, be inrolled in the high court of Chancery ; and that every such memorial shall contain the *day* of the *month* and the *year* when the *deed, bond, instrument, or other assurance bears date*, and the *names* of all *parties*, and for whom any of them are trustees, and of all *the witnesses*, and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same ; otherwise every such *deed, bond, instrument, or other assurance*, shall be *null and void* to all intents and purposes." And in the third section it enacts, " That in every *deed, instrument, or other assurance*, whereby any annuity or rent charge shall thereafter be granted, or attempted to be granted, the consideration *really* and *bona fide* (which shall be in money only) and also the name or names of the person or persons by whom, and on whose behalf, the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth in words at length ; and in case the same shall not be fully and truly set forth and described, every such *deed, instrument or other assurance*, shall be *null and void* to all intents and * purposes." The fourth section provides, " That if any part of the consideration be returned to the person advancing the same, or in case the consideration or any part of it, is paid in notes, if any of the notes with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid ; or if the consideration or any part of it, is paid in goods ; or if any part of the consideration is retained on pretence of answering the future payments of the annuity or any other pretence ; in all and every of the aforesaid cases, it shall and may be lawful for the person, by whom the annuity or rent-charge is made payable, to apply to the court, in which any action is brought for payment of the annuity *on judgment entered*, by motion to stay proceedings on the judgment or action ; and if it shall appear to the court, that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order the *deed, bond, instrument, or other assurance* to be cancelled, and the *judgment*, if any *has been entered*, to be *vacated*."

[* 211.]

In each of the foregoing clauses of the statute it is
observable,

observable, that the attention of * the legislature is [* 212.]
closely confined to the *deed, bond, instrument, or other assurance*, without any allusion whatever to the contract itself.

But in the sixth clause of the statute the phraseology is altered, the *securities* are no longer adverted to, but the legislature enacts, “ that all CONTRACTS for the *purchase* of any annuity with any person being under twenty-one years, shall *be and remain utterly void*, any attempt to confirm the same, after such person shall have attained the age of twenty-one years notwithstanding.” And then it proceeds to make any transactions with infants respecting annuities penal.

Now we have seen that the ground on which courts of law, in the construction of the statutes against gaming, have held that there is a clear distinction between the contract and the security, is the different manner of wording the statutes as applied to money lost and money lent at play. Surely that argument applies with equal, nay with greater force to the Annuity Act, the *clauses* in which act are, as we have seen, differently worded, and therefore require a different exposition. The statutes in both cases ; namely, those against *gaming, and that respecting the purchase of annuities ; begin with a preamble alluding to the mischiefs that arise from the practices meant to be regulated. In both cases the laws are highly remedial and penal. They respectively provide for different mischiefs, arising from similar causes, according to the degree in which they affect society. The legislator foresaw that there was little reason to apprehend any danger from third persons advancing money to those who are at play, when any security taken for it would be void under the statute. But nothing less than annihilating the contract promised to be a restraint on the warmth, zeal, and passion of the parties *actually* engaged. The legislature, therefore, suited the remedy to the urgency of each case. The same train of reasoning applies to annuities. The purchaser when he reflects that unless the requisitions of the statute are complied with, his securities will be void, will not easily be induced to dispense with those forms. The seller, likewise, will not find it worth his while to pay for such a risk. The case will therefore rarely, if ever, occur but from oversight in the solicitor. The mischiefs, therefore, arising to adult persons are not much to be apprehended,
the

[* 214.]

the *remedy that will result from cancelling the securities is adequate to the mischief. But the case is otherwise as to annuity contracts with infants. All dealing on contract with them is mere gambling. It must therefore be upon terms the most extortionate, or the risk cannot be paid for. Depending upon honor only, the passions and feelings of the man are engaged, and in the unguarded moments of youth such contracts would generally be confirmed. To the contract, therefore, the legislature points the remedy, and, to place such contracts in as critical a state as possible, the legislature has not only declared them void, but also put it out of the power even of the parties themselves at any subsequent time to give them stability; since, to be equal, they must be founded on terms destructive to one of the parties, which is a mode of dealing universally prevented in all well regulated societies. If these observations apply, the distinction taken on the laws against gaming between vacating the securities and annulling the contract, according to the degree of mischief incident to the transaction, is equally applicable to the cases of annuities; and the terms in which the legislature has provided the remedy not only warrant, but, for the sake of analogy in * legal proceedings, *require* that it should be taken. And, if so, it appears to me, that, whatever be the nature of the neglect of the circumstances imposed by the statute, or whatever be the nature of the mistake (if it be not that of treating with persons under years of discretion) it will only affect the security, leaving the contract valid, and, if capable of proof without the production of the securities, capable also of being enforced by a suitable action.

[* 215.]

Shovev. Webb,
1 Term Rep.
732.

I should here observe, that the opinion of the court of King's Bench, in the case of *Shove* and *Webb*, confirms, in express terms, these principles, although the inference, drawn from them therein, seems to me, to militate totally against the conclusion they necessarily furnished in that case. The facts were as follow: A. had granted an annuity secured by bond and judgment, and an assignment of half pay as an ensign in the army by way of collateral security for the payment of it. These instruments had been set aside in the court of Common Pleas, because part of the consideration for which the annuity had been granted, was money due from the grantor to the grantee for goods previously
fold

fold by the grantee * to the annuitant, *which fact was not specified in the memorial as registered* (the memorial stating the whole consideration as paid in money.) The residue of the consideration was paid in cash, at the time of granting the annuity. Upon the securities being set aside, the purchaser, to recover the consideration paid for the annuity, brought an action of assumpsit for goods sold and delivered; money paid, laid out, and expended; money had and received, &c. and had a verdict for the whole sum, as well the value of the goods, as the money paid as the consideration of the annuity; but subject to the opinion of the court on the question, whether the legislature meant to make it illegal to *contract* for the sale of an annuity for any other consideration than that of money. And whether, if any part of the consideration was for goods delivered, it so far tainted the transaction, that, if the security were set aside, no right of action could ever arise as for goods sold? and *Ashhurst*, Justice, delivered the opinion of the court, "That the goods, in this case, being really and *bonafide* sold, the *contract* was STRICTLY *legal*, and not within the mischiefs intended to be remedied by the act; although the SECURITIES were properly *set aside* and *vacated*, by reason * of the consideration not being truly stated." But the conclusion drawn from these premises seems to me to be erroneous: for the judge proceeds thus: "And taking that to be the case, when the security was vacated, the original contract revived (i. e. the contract for sale of the goods.)"

Now how the vacating the securities could revive the original contract for goods sold and delivered, &c. when the contract, by which the debt due for them was made part of the consideration for the purchase of the annuity, was declared "to be a *contract* STRICTLY *legal*, and not within the mischief intended to be remedied by the act," to me is inexplicable, unless it can be shewn that the contract and the securities are convertible terms; which position the court itself denies in this very judgment, by cautiously distinguishing between the *contract* and the *securities*, holding the former strictly legal, the latter clearly void.

Perhaps it may be contended, that, in these cases, the rendering the securities void, renders the contract so eventually; upon the ground that the parol contract

[* 218.] is determined by being * put into writing under seal. And then, that the writings being void for the reasons above-mentioned, the contract will be virtually so. Though it appears to me, that the question now in discussion may be determined in favor of the argument, that the original annuity contract by parol is subsisting, notwithstanding the proposition put by way of argument were true, on another ground equally clear and decisive, which will hereafter be mentioned; yet, as, should the ground alluded to, fail, then the truth or falsehood of this proposition will become material, I shall investigate the principle of it here, and shew that it will not hold, if applied to a case, where there is a parol agreement, originally valid in law, and subsisting independent of the written securities : for it is perfectly clear, that the mere fact of putting a verbal contract or agreement into writing under seal does not determine it, or render it void, but, on the contrary leaves the party, interested therein, at liberty to pursue his remedy to enforce performance, either on the parol contract or the written instrument at his election. This proposition will be best illustrated by an example. A. instituted a plea of debt against * B. for 10*l*. before the mayor of *London*, and declared upon contract for goods sold, the value of which amounted to that sum. B. waged his law; to which A. replied, that, according to the custom of *London*, if the plaintiff could shew a paper or parchment, written and under seal of the defendant, which proved the contract, the defendant would be ousted of his law. And he shewed a writing, under seal of the defendant, to that effect, and prayed that the defendant should be ousted of his law. And it was contended that the plaintiff should be barred, for that he ought to have brought his action upon the writing, and not upon the contract. But *Prifot* was of a contrary opinion, for he said that the contract was not the worse because of the writing, and he compared it to the case of one bailing goods by deed indented, who might afterwards bring a writ of detinue for them without counting upon the indenture, because it was only a writing proving the bailment. And he said the law was the same if a man made a contract by deed indented; for, there, he was not obliged to count upon the deed indented, for that the contract did not determine upon the deed indented, but

[* 219.]
M. 39 H. 6. 34
Bro. tit. Def.
Pl. 68.

27 H. 8. 22.
2 H. 6. 9. Pl. 5.

but the party might elect how he * would bring his action (to which position all the justices agreed.) So, he said, in the case put, the contract was not determined by the indenture under seal, which was an evidence of the contract, &c. And, therefore, that the action would lie notwithstanding that objection.

[* 220.]

It may, perhaps, be objected, that the last-mentioned opinion arose upon a question put to the justices by the recorder of *London* (as was the custom in those days) and is, therefore, not to be esteemed a judicial decision of it, but the same point has been repeatedly brought before the court. As the subject which induces the citation is important, I shall mention one other case.

An Abbot and his predecessors, had used time out of mind to find a chaplain to a church belonging to another man. Afterwards, by deed indented, reciting that, whereas a dispute had arisen between them respecting this matter, &c. and for that the Abbot had used, &c. *ut supra*, the Abbot and the convent covenanted and granted that they would find a priest, &c. And an action was brought for * a non-feazance, in which the plaintiff, in his count, made title by prescription. Hereupon it was contended by the defendant's counsel, that the action did not lie, because the prescription was determined by the deed indented. But it was held by *Froville*, Chief Justice, and *Fisher*, *Vavisor*, and *Buller*, Justices, that the prescription remained, and the action well lay; for the deed was in affirmation of the prescription, and of the same thing, and not contrary to it, and the deed recited the prescription, so that the intent of the deed was to support the prescription, and not to take it away.

Hil. 21 H. 7. 5.
Pl. 2. Bro. tit.
Grant 57. Ibid.
tit. Prescrip.
35. Et vid. 1 H.
6. 8. 2 H. 6. 9.

[* 221.]

To apply these cases (which, though of an ancient date, yet, if applicable, must be considered as undoubted authority, unless later decisions in subversion of them, or of the principle contained therein can be produced) to the question under our consideration. If the construction of the Annuity Act herein contended for, *viz.* that it applies, in the cases alluded to, to the securities, not to the contract, be the right construction (and it appears to me, that every argument which supported that construction of the Gaming Act, applies

[* 222.]

plies * with greater force to the Annuity Act) the consequence of making void the security will be only to make the deeds a nullity, and to leave the original contract, which subsists independent of them, and which they were intended to enforce in full effect between the parties. For instance, to apply our arguments to the case of *Shove* and *Webb*. The security there was by a bond and judgment, with a charge upon half pay by way of collateral security. In such a case, the bond recites a contract before subsisting, and is conditioned for the performance of it. The deed, making the charge, is upon the same plan; that also recites the contract and the bond, and imports to be intended for further securing the performance of it. So that all the securities recite, corroborate, and confirm the original annuity contract, as a contract subsisting and independent of either of them. Upon this head, *Froville*, Chief Just. in the case before cited, *Hil. 21 H. 7. fol. 6. a.* puts an instance expressly in point; for he says, that it had been adjudged, in that reign, where one had an annuity by prescription, and also a grant by deed that the grantor would pay it, and that, for default of payment, the grantee * should distrain; the annuity should nevertheless continue, *i. e.* that the rent charge granted by deed, should not determine the personal charge by prescription, but the one should be considered as an additional security for the other.

[* 223.]

But perhaps it may be said, that the case of *Shove* and *Webb* is distinguishable from those here cited to illustrate the principle, "that the putting a verbal contract or agreement into writing, does not determine or render it void," upon the ground that the grantor in this case entered into a bond, and, thereby, determined the original contract by parol: which is a ground of distinction taken by *Prisot, arguendo* in the case before cited, *M. 39 H. 6.* But the answer is obvious, and applies equally to all the securities taken and not registered. The statute enacts, "that the deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes." And no one would be heard, who should contend that a deed, bond, instrument, or assurance, *ipso facto* null and void to all intents and purposes, can be effective to the purpose

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pose of determining a contract * independently and previously subsisting. If this reasoning be just, the consequence of cancelling the securities in the principal case was, not to revive the original contract for the hosiery, but to revive the original parol contract for the annuity, which remained in suspense until the bond should become valid by the consideration being registered, or be cancelled pursuant to the act.

[* 224.]

But should it be adjudged that a bond, so predicated, that is an *essentially null and void bond*, determined the original annuity contract, the effect of such a decision could only be, to take such a case out of the principle of construction here attempted to be supported, leaving all cases in which there is no bond given, to depend upon the principles which have been stated and supported upon unquestionable authority.

Indeed, instances may be put, in which the contract is so dependent upon the security, that the cancelling the latter will render the former unattainable. This will happen, for instance, in all cases, where the annuity is granted to issue out of land only, and the * grantee is restricted from charging the person of the grantor : for in that case (the statute of frauds having declared, that contracts respecting lands shall be in writing) if the writing be cancelled, the contract, which cannot be made out except by the security, will become inoperative.

[* 225.]

Then, if there be a distinction between the case of an annuity chargeable upon the person of the grantor, and an annuity charged upon his estate without reference to the person, as to the validity of the contract independent of the securities ; the question will be, what shall be the situation of the parties in the latter case, in which the proof of the contract falls to the ground, with the securities which uphold it. And in order to decide this question, we must advert to what was the object of the legislature in this act of parliament. The end of this law, in rendering void *securities* made under *circumstances* prohibited by the statute, is not only to avoid what has been done, but to prevent the thing prohibited, by throwing difficulties in the way of the purchaser. With this view it strips him of

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the benefit of any security * which he has gotten, if the circumstances of the transaction be not conformable to the requisitions of the statute. But it applies the remedy to the securities which are to be cancelled, leaving the offender to make out his contract as he can. Notwithstanding the interposition of the statute, the contract still remains a sale of an annuity in substance. If the purchaser fail in making it out, he has to thank himself for it. It is his own neglect. It does not therefore follow, even in this case, that because the contract is incapable of proof, the purchase money shall be recoverable upon an assumpsit, on the ground that the cause or consideration upon which the money was paid has failed, for that is not the case. The consideration subsists, although the security be cancelled upon application to a court authorized to vacate it. The contract, in the eye of the law, continues, although there be a defect in the proof of it, by reason of the statute of frauds interfering and preventing parol evidence of it.

[* 227.]

If the law, by an implied assumpsit, gave the grantee a remedy for his principal, the statute would be of little effect in either case. * Men would be very indifferent whether they complied with the requisitions of the statute, if the only consequence of neglecting them were the setting aside the annuity, the annuitant being left debtor for the money advanced. This would make the statute *felo de se*; for it is seldom that those, whose necessities drive them to contract upon such exorbitant terms, are in a condition to restore the money they have received. The embarrassment meant to be thrown upon the grantee, would, if that were required, fall upon the grantor. Perhaps it may be said, that this would tend to deprive the grantee of both his principal and his annuity, which will be more than an adequate punishment for the neglect of the requisitions of the statute. It may be so; but the legislature have done this, not directly, but consequentially. If the contract can be made out without the securities, the law does not deny the parties the benefit of it. But since it is executed in a manner that the law does not approve, it will not help the parties, but leaves them in the state it finds them in, denying the contract its protection, which he has not deserved.

Indeed,

Indeed, in the case of *Shove* and *Webb*, a* distinction is attempted between an annuity, defective by a neglect as to the register of the consideration, and an annuity, defective by reason of the consideration being of a nature the statute prohibits: and it is said, that the latter case is in the teeth of the statute; from whence we are to infer, that the former is not so. But the statute makes no such distinction. It declares in the 1st clause, that the memorial shall set forth the consideration or considerations, otherwise the deed, bond, instrument, or assurance, shall be null and void. And in the 4th clause it enacts, "that if any part of the consideration shall be returned to the person advancing the same, or in case the consideration, or any part of it is paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if the consideration, or any part of it, is paid in goods, &c. in all and every of the aforesaid cases, it shall and may be lawful for the person by whom the annuity or rentcharge is made payable, to apply to the court, &c. by motion, to stay proceedings on the judgment or action; and, if it shall appear to the court that such practices, or any of them, * have been used, it shall and may be lawful for the court to order the deed, bond, instrument, or other assurance to be cancelled, and the judgment, if any has been entered, to be vacated." The statute, in both instances, applies to the securities, and, in effect, enforces the same consequence. It furnishes no ground from whence to infer, that the legislature intended to make the one case more penal than the other.

[* 228.]
Supra.

[* 229.]

That a contract should fail of effect for want of the party, claiming a benefit by it, being capable to substantiate it by legal evidence, is not unusual. If a man lend another money, without taking a security for it, or calling in evidence to witness the transaction, and the borrower prove dishonest, the lender has no remedy either at law or in equity. If a man take a bond, and there be no witnesses to the execution of it, he will be incapable of recovering thereupon for want of proof of a delivery. Yet, in such case, he can have no relief either at law or in equity. This statute then, in respect of the neglect or malfeasance of the vendee, puts him in the same situation as he would have been, had he taken no security, but rested on a parol contract.

[* 230.] * tract. If he has any evidence competent to prove the contract, he may recover thereupon. If he is deficient in respect of such evidence, it is his own fault. But the payment of the money being upon the foot of the contract, which contract the law leaves untouched, it seems a necessary consequence that no new contract can be inferred repugnant to the original contract, which an *implied assumpsit to restore the consideration* would be.

The construction here contended for, agrees with the words of the act, is consonant to that put upon a similar legislative interposition against gaming, and will effectually prevent the practices meant to be prohibited; for as no man will lend money on such a parol contract, so neither will he place himself in a situation which will expose him to the same consequences as if he had done so. But if the construction of the statutes be that the contract is void, and, consequently, that the money paid upon it may be recovered on an implied assumpsit (which, if the case of *Shove* and *Webb* is rightly determined, must be the case in all the instances provided against by the statute, that notwithstanding made * the shade of a distinction between them, except by making the securities absolutely void for a fault in the enrolment, but voidable only in the other instances) a man may safely adventure any of the things prohibited by the act; as the worst that can happen to him is, to have the securities set aside, and his money returned, which, if he has received any part of his annuity, will have lain at that interest.

Vide 21 H. 7.
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If the subject of a contract or agreement be self-evidently useless, as tending to no consequence when put in execution, this will render the contract or agreement void. And the motive to consider it so will be still stronger, if it be of such a nature as, if not performed, it brings no loss or prejudice to the party stipulating it, and if fulfilled, will create trouble or damage to the performer; because, engagements of this kind produce no obligation: for how can a man have a right of requiring me to put myself to any charges, or any toil, in doing a thing which shall profit him nothing? and it is, indeed, against reason to undertake an action which can produce no good, and may produce evil. This seems to be one strong ground

* ground for the distinction between a contract to restrain a man from trading generally, and a contract to restrain him from trading in a particular place ; for what can it signify to a tradesman in *London*, what another tradesman does at *Newcastle* ? In this respect our law is agreeable to the *Roman* law ; for that law would not enforce such contracts by an action. As if any person had agreed not to wash his hands, or comb his head, or change his linen for such a time, or to abstain from eating for several days or the like.

[* 232.]

Vide Puff. lib.
5. c. 2. sec. 3.

So any contract which, in its object, wantonly affects the interest or the feelings of a third person, and thereby disturbs the peace of society, will be reprobated in a court of justice ; nor will any action be retained thereupon.

Therefore a wagering contract, that a woman has committed adultery ; or that an unmarried woman has had a bastard, would be void ; because such wagers are not only an injury to a third person, but disturb the peace of society. Therefore the law will not permit third persons, merely for the purpose of laying a wager, thus wantonly to expose * others to ridicule, and libel them under the form of an action.

Cowper 735.

[* 233.]

Upon this ground it was held, that no assumpsit would lie upon a wager between two indifferent persons, as to the sex of Monsieur the Chevalier *D'Eon* ; for although whenever a question arises upon a real matter of right it shall be tried, notwithstanding the interests of third persons, not parties, may be affected by it ; yet two indifferent persons shall not by a wager between themselves, injure a third by trying, in an action upon a wager, whether he is a cheat and impostor ; nor attempt to shew in such an action that he is a woman, and be allowed to subpoena all his intimate friends and confidential attendants to give evidence to expose him.

Da Costa v.
Jones, Cowper
729.

And an action upon a contract that wantonly tends to the introduction of indecent evidence, will not be retained in a court of justice.

As if a wager were laid that a woman had a defect in a particular part of her body ; or that such a person was an hermaphrodite, or had a particular disorder ; or as to the cause why a woman did not breed, or the like.

OF

OF THE GENERAL NATURE OF CONTRACTS OR AGREEMENTS.

ALL contracts or agreements are distinguished, in the law of *England*, into Executed or Executory.

A contract or agreement is said to be executed, when two or more persons make over their right to one another, and thereby change the property therein, either presently and at once, or at a future time, upon some event that shall give it full effect, without either party trusting to the other : as where things are bought, paid for, and delivered ; or where a man has lands under some engagement, and disposes thereof from the time such engagement ceases.

Contracts executed do not, in general, retain the name of Agreements, but are denominated by some particular term applicable to their respective natures. As, a Sale, a Grant, a Lease, an assignment, a Mortgage, or the like.

[*235.]

* Executory contracts or agreements, according to the ordinary acceptation of the term Agreement, are such contracts as rest on articles, memorandums, parol promises, or undertakings, and the like, entered into preparatory to, and introductory of, more solemn and formal alienations of our property or free-agency. All promises or agreements to give, grant, sell, &c. belong to the former class : All promises or undertakings to do or suffer, belong to the latter class.

A contract, therefore, is said to be executory, either when one party performs and the other is trusted : as a loan of money, on a promise to secure it by a mortgage of land ; or when neither party performs, but each trusts the other : as a promise to take in charge in respect of a premium to be given ; or a covenant to make a lease in consideration of a sum stipulated to be paid for it.

Contracts or agreements are applicable to all rights, real, personal, or mixed, which may lawfully become the subject of traffic.

All

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All contracts and agreements whether *executory or executed, may be considered : First, as express, constructive or implicative. Secondly, as simple and absolute, or conditional. And thirdly, as written or unwritten. [* 236.]

First, express contracts or agreements are where each party stipulates in positive terms, what is agreed to be done or omitted.

Constructive contracts, or agreements, are those where the law in expounding the instrument upon which the contract arises, raises a contract of a different nature from that which, *prima facie*, the instrument imports.

Thus, though a grant or lease of tythes to a parishioner for a year is not good, *qua such*, without a deed ; yet the law will give effect to it, though it be in form of a lease under the notion of its being an agreement to be discharged from tythes : which is an agreement by way of contract by retainer, and not a lease.

And the recitals in a deed for transferring property, respecting the grantor's estate in *that property, amount, by construction of law, to an agreement that the grantor is entitled as is stated in such recitals. [* 237.]

Thus where A. by his deed poll, reciting that " WHEREAS HE WAS possessed of certain lands for years for a certain term, assigned the same, by good and lawful conveyance, to J. S. with divers covenants, articles, and agreements in the said deed contained, which were or ought to be performed on his part ;" the question was, whether this recital *viz.* " where-as he was, &c." was an article or agreement within the meaning of the condition of a bond which was given to perform covenants, &c. And it was held, that it was an agreement, because in such case the assignor agreed that he was possessed of it ; for, every thing contained in the deed was an agreement, and not *only that* which the assignor was bound to perform : as if a man recited by his deed, that he was possessed of a certain interest in certain land, and assigned it over by the same deed and thereby covenanted to perform all agreements in the deed ; if he were not possessed of such interest, the covenant would be broken. And it was clearly agreed, in the principal case, that if the party had

Cro. Ja. 137.
668. Yelv. 131.
132. Lev. 24.
Sir T. Raym. 14.
Skinner 113.

Swern v.
Clerke,
1 Leon 122.

OF THE NATURE OF CONTRACTS

[* 238.] had not that *interest by a good and lawful conveyance, the obligation was forfeited.

Graves v.
White.

2 Freem. 57.
Et vid. Ibid. 3.
2 Eq. Ca. Abr.
652. 1.

So a recital in articles made upon a marriage, "that whereas the defendant was to pay to the plaintiff one thousand pounds for the marriage portion of the wife, the plaintiff covenanted to settle, &c. was held to be a good ground to support an action of covenant, and the chancellor said, that court would decree the 1000*l.* to be paid.

Cro. Eliz. 657.

Upon the same principle, an exception in a deed *indented* is held to be an agreement : as if one let land to another, excepting a particular close ; here the exception is an agreement ; for the words of an indenture, put in the generality, bind both parties, and are taken to be the agreement of each party.

Plowd. 67.
2 Leon. 117.

But distinctions have been taken as to the effect of such an agreement ; for it is said by *Montague*, Just. in *Dier* and *Manningham's* case, that if one make a lease for years of a manor, except a close, &c. rendering annually a rent, &c. and the lessee is bound to perform all grants, covenants, and agreements, *contenta, expressa, et recitata* in the indenture, and the *lessee disturb the lessor in the occupation of the close excepted, he has forfeited the obligation : for, when the grantor excepts the close, the grantee is content with it, and that the lessor shall occupy it ; and then this is an agreement ; and the words, "*contenta, expressa, et recitata,*" do each of them go, as well to the exception as to the rest.

[* 239.]

Cro. Eliz. 657.
1 Roll Rep. 102.
11 Rep. 50 b.

But the above case, as put by *Montague*, has since, in the case of *Lady Ruffel* and *Gulwel*, been denied to be law, so far as goes to the application of the obligation to the excepted part, as parcel of the premises ; for, although it is agreed that an exception is an agreement of the lessee, that the land excepted shall not pass by the demise ; yet, it is said, *there*, not to be any agreement, that he shall not occupy.

Lady Ruffel
v. Gulwel.
Cro. Eliz 657.
S. C. Moore,
Pl. 747.

The case of *Ruffel* and *Gulwel*, arose on an action of debt for 500*l.* conditioned for the performance of all covenants, articles, and agreements in such an indenture (betwixt the plaintiff on the one part, and the defendant on the other part) on the part of the defendant to be performed. In the indenture was contained a clause,
" that

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“that the plaintiff let to the * defendant certain lands, called *E. Pastures, excepting a close called E. Close.*” The defendant pleaded, that he had performed all the covenants, &c. The plaintiff assigned for breach, that the defendant entered into the close excepted, and thereof disseised her, *et. fi.* &c. The defendant demurred in law. And on the part of the plaintiff, it was contended to be a breach; for that the exception was an agreement that the lessor should retain it, because an indenture is the deed of every of the parties; and that, therefore, the disturbance of the plaintiff from the occupying thereof, was a breach of the agreement. And of that opinion was *Cawdy*, Just. But *Popham* and *Fenner* were of a contrary opinion. They agreed, that an exception was an agreement of the lessee, that the land excepted should not pass by the demise; but they said, that it was not any agreement that he should not occupy. And, afterwards, this case was at another time moved again, and *Popham* said, that he had conferred with the other justices, and the greater part of them agreed, *that this exception was not such an agreement, as was within the intent of the condition of the obligation; and that the obligation was not forfeited by this disturbance.*

* And *Coke*, Chief Justice in the case of *Stampe v. Lifford*, expressed himself to be of the same opinion, and denied the case as put in *Plowden* to be law.

But it was admitted, in the case of *Russel* and *Gulwel*, that sometimes an exception in a lease amounted to an agreement that should charge the lessee: but that was, where he agreed, on his part, that the lessor should have a thing *dehors*, which he had not previously. As if the lessor let lands excepting a way, or any other profit *a prender*; this it was said would amount to an agreement by the lessee, that the lessor should have the way or profit. And if the lessee were obliged to perform all the covenants and agreements in such an indenture, and he disturbed the lessor, he would, in this case forfeit his obligation: for here the lessee would have an interest in the thing excepted.

So in debt upon bond where the condition was, that, whereas the plaintiff had covenanted with the defendant, that it should be lawful for the defendant to cut down wood for fire-boot and hedge-boot, without making any waste, or cutting any more than necessary: and the plaintiff assigned the breach in this

S

covenant

[* 240.]

[* 241.]
Rolls Rep. 102.

Supra.

Stevenson's
case, 1 Leon.
324.

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[* 242.] * covenant (which was in truth the covenant of the plaintiff) that the defendant had committed waste in felling wood, &c. and the condition was to perform all covenants and agreements : exception was taken, because the condition ought to extend but to covenants to be performed on the part of the lessee : but the exception was not allowed ; for it was the agreement of the lessee, although it was the covenant of the lessor.

Cro. Eliz. 657.
Dyer 57.
21 E. 4. 6. a.
Pl. 18.

So a reservation of rent is as an agreement of both parties : on the part of the lessor for the reservation, and of the lessee to take the land at the rent proposed.

Styles 407, 431.
1 Vent. 10.
1 Roll 519, 10.

Thus where a lease for years was made by indenture, yielding and paying so much rent to the lessor : the words “ yielding and paying,” though not the words of the lessee, but the words of the lessor, enjoining the lessee to pay the rent, were held to make an agreement of the lessee to pay the rent.

Cro. Ja. 399.
Pl. 5. Poph.
136, 137.
1 Roll Abr.

[* 243.]
518. C. 1.

So these words in an indenture of lease, “ and the said lessee, his executors and assigns, shall, from time to time, repair the said house, and shall leave it so repaired, &c.” amount to * a clear agreement between the parties ; and bind the lessee, by his acceptance of the lease.

Hob. 132.

It has been determined upon the same principle that a lease, *without impeachment of waste*, gives the lessee the trees growing upon the estate demised.

Ibid.

So, if the lessor covenant and grant, “ that it shall be lawful for the lessee of a term certain, to take and carry away to his own use, such corn as shall be growing upon the land at the end of the term ;” although these words are not words of gift of the corn, but, merely that it shall be lawful for the lessee to take it for his own use, yet are they sufficient to transfer the property.

And the reason on which these cases are so understood, seems to be, that where persons are agreed upon a thing, and words are expressed or written to make the agreement, although they are not apt and usual words, or whether they proceed or not from the proper party, yet, if they have substance in them tending to the effect proposed, and the proper party agrees to them,

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them, the law will give them * effect, by construction, according to the intent and common use of such words; for the law always regards the intention of the parties, and will apply the words to that which, in common presumption, may be taken to be their intent: and the agreement of the minds of the parties is the only thing the law respects in contracts; and, therefore, such words as express the intent of the parties, and have substance in them, are sufficient.

[* 244.]

And, therefore, if a man be bound in an obligation, which is indorsed, that the obligee wills and grants, that if the obligor stands by the arbitrament, order, and judgment of A. and B. then the obligation shall be void: it is no ground of objection, that the words are the words of the obligee, and not of the obligor, but the condition is good; for there is the substance of a condition, and the intent of the parties appears.

21 H. 6. 51.
Fitz. Bar. 157.
Bro. cond. 58.
1 Leon. 246.

And a covenant by parol, takes effect as an agreement or contract.

Thus, wherever a man covenants by parol, without specialty, to do any thing for a certain sum of money, or the like; there, if he * do not according to his covenant: as if he either omit to do, or does in a bad manner the thing covenanted about, an action upon the case lies; because the covenant is a contract or agreement between them.

Fitz. nat. brev.
341. 3 H. 6. 36.

[* 245.]
Bro. tit. Action
sur le Case, Pl.
7. 10. 69. 20 H.
6. 34. 14 H. 6.
16. 18 H. 6.
20b Vide 1 H.
4. 33. Pl. 60.
Action on the
case does not
lie on covenant,
where nothing
done in perfor-
mance.

As if one covenant to cover in my hall or my house within a certain time, and then neglect so to do, by reason whereof the timber is damaged by the rain, an action on the case lies against the covenantor. So if one covenant to amend certain ditches on my land, and neglect so to do, by reason of which the ewes, who ought to feed within the ditch, come upon my land and destroy my corn, a good action on the case lies for this nonteachance; or if a farrier covenant to shoe my horse, and he neglect to shoe him, or prick him in shoeing him; or if one undertake to plow my land in a seasonable time, and he do it in an unseasonable time, or neglect doing it, an action on the case lies. And the reason of all these cases is, that the *res gestæ* amount to an undertaking and a matter *en fait*, rather than a thing founding in covenant.

3 H. 6. 36. b.
Br. Act sur le
Case 7. Con-
tract 5.
14 H. 6. 18. b.
21 H. 6. 55. b.

Implicative contracts are such as do not arise from the

Finch's law,
180.

[* 246.]

the special agreement of the parties,* but arise by act and operation of law, out of the circumstances of the case. As if, on a sale of goods, the buyer pay money in part of satisfaction, and afterwards the whole value of the goods be recovered against him at law; the money so paid upon that account, becomes money received for the use of him that paid it; and the law raises an implied assumpsit, upon which he may recover it in an action. So, if a hostler give my horse meat, or a taylor make my cloaths, the one shall have his action on an implied contract for his meat, and the other for his work. And he that receives money for my use, or to deliver it over to me, is chargeable as a receiver. So, if one enter into an infant's or another's land, and take the profits, he is chargeable as bailiff. And if a liberate be delivered to the clerk of the hamper, who has affects in his hands, an action of debt lies against him. So does it upon every judgment.

So, wherever a man, by any means, hath the custody of goods belonging to another; the law implies a contract, by which he is bound to take care of them according to the nature of the bailment.

[* 247.]

* In order clearly to understand the nature and extent of the contract the law raises in such cases, it is necessary to state what are the several sorts of bailments. There are six sorts of bailments.

L. Raym, 913.

First. A bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor, and this is called "*depositum*." In this case the law implies a contract by the bailee, that he will take such care of them, as that they may not be damaged by any gross neglect of his own. For, in such case, it would be contrary to reason or justice, that where a man is to have no reward, but keeps the goods merely for the use of the bailor, that he should be charged without some default in him; it does not seem necessary that he should even do all he is capable of, or that a man could do for himself in things he was most concerned for. If he keep the goods with an *ordinary care*, he has performed the trust reposed in him. And this is going as far as the end and nature of such a contract requires; for it is not to be supposed, that in such cases a man engaged to take care, is to be at expences extraordinary,
or

or to neglect other * affairs of his own, though perhaps less important in themselves, to attend other men's, as perhaps he might do if he acted for himself. But if the bailee keep the goods bailed to him as he keeps his own, it is evidence that he has discharged his undertaking. And, therefore, in such case, although he keep his own but negligently, yet, if he keep the others in the same manner, he shall not be chargeable. As if the bailee be known as an idle, careless, drunken fellow, and he come home drunk, and leave all his doors open; and by reason thereof the goods bailed to him happen to be stolen, with his own, yet he shall not be charged, because it was the bailor's own folly to trust such a fellow. And this doctrine is agreeable to reason, and to the civil law. *Ex eo solo tenetur si quid dolo commiserit: Culpæ autem nomine, id est, desidii ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiseret, quia qui negligenter amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet.*

The proposition here put by Lord Holt is meant, only to illustrate the conclusion, that, whatever care a man takes of his own, that care, applied to such a deposit, is sufficient.

Hob 34 3 Cro. 214, 2 Cro. 425.

And if a person, receiving goods upon such a bare naked bailment, were to enter into a written undertaking to re-deliver them; it * would not charge the party undertaking further than he would be charged by the implication of law: for it would not go further than a covenant, that the covenantee shall have, occupy, and enjoy certain lands, which does not bind against the acts of wrong-doers.

The second kind of bailment is, where goods or chattels, that are useful, are lent to a friend *gratis* to be used by him. And this is called "*Commodatum*;" because the thing is to be restored in specie.

L Raym. 913.

In this case the law implies, that the borrower contracts to use the strictest care and diligence, to keep the goods, so as to restore them back again safe to the lender; because the bailee has a benefit by the use of them. And, therefore, if the bailee be guilty of the least neglect, he will be answerable. As if a man lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, and any accident happen to it in the northern journey, or after the month, the bailee will be chargeable: because he has made use of the horse contrary to the trust he was lent to him under;

Ibid. 915.

and

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[* 250.]

Bracton, lib. 3.
cap. 2.

* and it may be, that, if the horse had been used no otherwise than he was lent, the accident would not have befallen him. This is agreeable to *Bracton*, who says, “*Is autem cui res aliqua utenda datur, reobligatur, quæ commodata est ; sed magna differentia est inter mutuum et commodatum ; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incurfu, consumpta fuerit, vel deperdita, subtrahita, vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius, potuit custodire ; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incurfu hostium vel prædonum, vel naufragio, amiserit non est dubium quin ad rei restitutionem teneatur.*”

But if the bailee, in the preceding instance, had put the horse in his stable, and he had been stolen from thence, the bailee would not have been answerable for him, unless he or his servants had left the house or stable doors open, and the thieves had taken that opportunity, and had stolen the horse ; for then he would be chargeable : because the neglect gave the thieves the opportunity to steal it. *Bracton* says, the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist.

[* 251.]

L. Raym, 913.

The third kind of bailment is, when goods are left with the bailee to be used by him for hire ; this, in the civil law, is called “*locatio*” et “*conductio*.” And the lender is called *locator*, and the borrower *conductor*.

In this case, also, the law implies, that the hirer contracts to take the utmost care, and to return the goods when the time of hiring is expired. But every man, how diligent soever he may be, being liable to the accident of robbery, though a diligent man is not so liable as a careless one ; the bailee will not be answerable in this case, if the goods are stolen.

Ibid.

The fourth kind of bailment is, when goods or chattels are delivered to another as a pawn, to be a security for money borrowed of him by the bailor ; and this is called

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called in *Latin*, **“Vadium”*; and in *English*, a Pawn, [* 252.]
or a Pledge.

And as to this, *Brañon*, 99 b. points out the nature of the implied contract. “Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit nec impediatur creditum petere.” So that, in effect, if a creditor take a pawn, he is bound to restore it upon the payment of the debt: but yet it is sufficient, if the pawnee use *due diligence*, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawner for his debt.

Ibid. 917.
29 Aff. 28.

The same law applies in relation to goods found, the property in which continues in the owner, altho' the possession is in the finder. The law, therefore, implies a contract in the possessor to use an *ordinary diligence* to preserve them for the owner.

* But it is observable, in these cases, that, if the money, for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them: because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man who keeps goods by wrong, must be answerable for them *at all events*; for the detaining of them by him, is the reason of the loss. [* 253.]

The fifth kind of bailment is, when goods or chattels are delivered to be carried, or something is to be done concerning them by the bailee, for a *reward* to be paid by the person who delivers them.

1 L. Raym 913.

These cases are of two sorts; either a delivery to one who exercises a public employment, or a delivery to a private person. If it be to a person of the first description, and he is to have a reward, the law implies that he contracts to answer for the goods at all other events, except acts of God, or of the enemies of the king. If he be robbed, he is chargeable,

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[* 254.] * able, be the force that attack him ever so great. This is the case of the common carrier, common hoyman, master of a ship, &c.

If the delivery be to a person of the second description, of which nature are bailees, factors, and such like : these, though to have a reward for their management, yet are only to do the best they can. If, therefore, the bailee be robbed, he cannot be chargeable ; for it would be unreasonable to subject him to the execution of a trust, further than the nature of the thing puts it in his power to perform it. The law, therefore, in the case of a bailee, factor, or the like, implies a contract to use his abilities to take care of that with which he is entrusted.

Ibid.

The sixth sort of bailment is, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward, for such his work or carriage. And this is called, in the language of the *Civilians*, "*mandatum*." It is an obligation which arises *ex mandato*. It is what we call in *English* an acting by commission. And if a man acts by commission for * another *gratis*, and in executing his commission behaves himself *negligently*, he is answerable.

[* 255.]

Ibid. 916.
Keilw. 160,
2 H. 7 11.
22 Aff. 41.
Bro. Aff. sur
ca. 78.
1 Vent. 121.
10 H. 7. 26.
29 Aff. 28.

But, in these cases, there will be a difference in the implied contract, on the evidence how the undertaking appears to have been entered upon ; whether generally or specially : for in the former case, the undertaker only contracts in law against *gross neglect*. And, therefore, if one undertake to carry *brandies* for another, and mischief be done to it, by some person meeting the cart that it is in by the way, the bailee will not be liable ; as if a drunken man come by in the street, and pierce the cask. And the reason is, *that the bailee is to have nothing for his pains*. But in the latter case, namely, if a man *take upon himself* expressly to do such an act *safely and securely*, if the thing come to any damage *by his miscarriage*, the law implies a contract that he will be answerable ; the reason for which is, *that he undertakes the task, and is entrusted upon those terms*.

The law also implies a contract where the sheriff levies money on a *levari facias*, &c. and returns *paratus habeo*,
and

Speck v.
Richards.
Hob. 206.
Parkinson v.
Colliford,
March 13,

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and does not * deliver it in court ; and an action of debt lies against him in such case ; because, although there be no express contract, yet there is a contract in consideration of law ; for, *when* the money is levied, the action *ceases* against the party, and is, *ipso facto*, transferred to the sheriff.

[* 256.]

Upon the same principle of an implied assent, the law concludes that, if one man take another man's wife and cloath her, he intends to give the apparel unto her ; and her husband may take her with the apparel, and no action lies against him.

3 Cro. 244.
Finch. 22.
1 H. 4. 83.

It is held on the same reason, that if a man deliver stuff or other wares to another man's wife (knowing her to be a feme covert) to make apparel, without her husband's privity or allowance ; it is a gift of the stuff unto her : and her husband shall not be charged in any action for it.

So the law implies an agreement that the grantee of one thing, shall have every other thing necessary to the full enjoyment of what is granted.

* Thus if a man grant to me all his trees growing in his woods ; he is taken by implication to grant me leave to come upon the ground, and cut them down, and carry them through his land.

[* 257.]
Pflowd. Comm.
15.

So if land be granted to a man ; the law implies an agreement that he shall have a way to it, although it be not expressly mentioned.

Again, If a man license another to lay leaden *pipes* in his land for the purpose of conveying water to the other's cistern : the law implies an agreement that the *grantee* may enter, and dig up the land to mend the pipes.

Saund. 222.
323.

And equity also, in some cases, implies contracts, without any express agreement of the parties.

Thus if A. sell lands to B. who afterwards becomes a bankrupt, part of the purchase money not being paid : here equity implies a contract or agreement, that the land shall stand charged with so much of the purchase money as was not paid, without any special contract for that purpose : and, to give this

T

constructive

Tardiff v.
Scrugham,
8 Dec. 1769.
per L. Camden.
Et vid. Brown.
Rep. Chau.
423, 324.
Pollexton
v. Moore,
3 Atk. 272.

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[* 258.] * constructive agreement effect, equity considers the purchaser to be a trustee, to the extent of the money, for the vendor.

Dig. lib. 19.
lit. 2.

So if, after the time stipulated, the lessee continues to enjoy the thing *leased* without any opposition from the lessor ; both of them are supposed not only to prolong the contract until they declare off, *but for such a time as the original lease was measured by*, and on the same conditions ; for, *qui impletotempore conductionis remansit in conductione, reconduxisse videbitur*. And, therefore, if there be lessor and lessee for seven years, and the lessee hold over after the seven years determined, he is from thenceforward considered, in law, as tenant from year to year ; for, during the seven years, the term is executory for every year, and, in respect to the execution of it, it is the same as if there had been several contracts, one for one year, and another for another year, and so for every year severally. And the tenant holding over, is considered as doing so, upon the same terms as he engaged upon originally.

Secondly, contracts and agreements, we have observed, are either simple and absolute, or conditional.

[* 259.] * A contract or agreement is said to be simple and absolute, where one party obliges himself positively and without condition to such or such a performance ; in which case the other party may require it to be carried into effect : as if I make a lease for years to another, and he, in consideration thereof, promise to pay me a rent by the year ; this is a good contract, and upon failure in performance will support an action of debt for the rent yearly. So if I sell my lands for twenty pounds to be paid on a day certain ; in this case, if the money be not paid, I may, after the day, maintain an action for the money, though the land be not assured ; for the purchaser may compel me to assure it. Again, if a man take my money, and promise to build me a house by such a day, this is a good contract, and I may sue for breach of it.

Fitzh. tit. Debt
129.
2 H. 7. 12.
3 H. 7. 14.
Keilw. 69, 77.

A conditional agreement is, where the obligation thereof is, in some respect, made to depend upon some particular and uncertain event ; or, at least, an event uncertain at the time in the minds of the contracting parties, proceeding either from the act of God, or the act of the parties. As if I agree to purchase an estate of B. on condition that my son

* son returns from *India* on such a day. This condition, until it happens, suspends the obligation; and if it does not happen, disannuls it.

[* 260.]

So if I agree to give one thousand pounds to A. if he marry B. my daughter; here the obligation to pay the money is suspended, until the event stipulated takes effect.

Again; if an agreement be, that if B. deliver me twenty pounds worth of cloaths, or assure me such a piece of land, that I shall pay him twenty pounds: this is a good agreement conditionally; and after the performance of the condition (but not before) B. may maintain an action for the money.

33 H.6. fol 43.

So, if one sell cattle, upon condition that if the vendor do such a thing, then he shall have twenty pounds for them, else but ten pounds; this is a good contract, and the same will be more or less, as the condition is or is not performed.

Perk. sec 712.

And some contracts or agreements are conditional, with a reference; in which case they * are imperfect, until the reference made: as if A. and B. bargain and agree, that B. shall go upon A.'s land and see his corn, and, *if it please him upon sight*, that *then* he shall have it, paying to A. forty pounds for every acre: here the contract is binding upon A. if B. likes the corn, otherwise not.

17 E. 4. 1.

[* 261.]

So if I bargain with you, that I will give you for your land as much as it is reasonably worth, and refer to a third person to adjudge what is the value: here the contract is incomplete, until the referee adjudge the value; but after the value adjudged, both parties are bound.

Dyer 91 b.

14 H. 8. 17.

Conditions added to contracts, may be divided into two kinds: namely, first, Unlawful: and, secondly, Lawful.

First, as to unlawful conditions.

The effect of adding an unlawful condition to a contract, varies according to the nature of the contract, and of the condition. For, if a man be bound, upon condition that he do an act *malum in se*; as that he kill A. S. the bond is void. But if a man make a feoffment,

Co. Litt. 206. b.

[* 262.] * feoffment, upon condition that the feoffee shall kill J. S. the estate is absolute, and the condition void. In both instances the law aims at the same object, namely, the preventing the crime. For, in the former case, lest the obligee should have any temptation to do the act, the law frees him from the penalty of the bond. And for the same reason the law, in the latter case, secures to the feoffee the possession of the land, without performing the condition.

Ibid. et Cro. Ja.
596. 13 H. 7.
et vice Free-
man v. Free-
man, 2 Vern.
233.

All conditions that are repugnant to the nature of the contract entered into are void, as being against law. And, therefore, if a man make a feoffment in fee, upon condition that the feoffee shall not alien, this condition is repugnant and void ; and the estate of the feoffee is absolute : because the power of aliening is incident to the grantee of a fee.

Ibid.

Upon the same principle it is held, that, if a man make a feoffment in fee, upon condition that the feoffee shall not take the profits of the land ; this condition is against law, as being repugnant to the grant : for the feoffment of the land includes the profits ; and the estate is absolute.

[[* 263.] * But a covenant or bond, with a condition that the feoffee shall not take the profits of the land, or shall not alien, is good.

Ibid.

The reason of these distinctions is, that in case of the covenant or bond, the feoffee may alien or take the profits, if he will forfeit his covenant or bond ; consequently there is no total bar to alienation or receiving the profits : but otherwise it is, as to such a condition, added to the feoffment ; for if that were good, no alienation or taking the profits, could take effect.

Secondly, lawful conditions may be divided into possible and impossible.

Lawful, possible conditions, may be divided into three sorts, according to the effects they produce.

First ; such as *accomplish* the contracts that depend upon them : as if a man agree with his lessee for years, that, upon payment of 100*l.* within the term, he will convey to him the fee.

Secondly ; such as dissolve a bargain : as if
a lease

* a lease be made, with a condition to be void if the lessee under-let, or, if he become a bankrupt, or the like.

[* 264.]

Thirdly ; such as neither *accomplish* nor *dissolve* a contract or bargain, only making some change in it ; as if one agree, that if 6 *per cent.* (being the interest due upon a mortgage) be paid within three months after it becomes due, the interest shall abate to 5 *per cent.* Of the same nature is an agreement, that, in case an house that is let furnished, be given up to a future tenant without certain moveables, which are promised him, the hirer shall have it so much the cheaper.

Again, impossible conditions are divisible into such as are so, at the time of entering into the contract ; and such as become so by matter, *ex post facto*.

Co. Litt. 206.

There are several diversities in the cases of impossible conditions, in their effects on contracts : *Ex gratia*, if a condition, possible *at the making thereof*, but becoming impossible by the act of God, be annexed to a *contract executed*, as a feoffment, gift in tail, or the * like ; the estate of the feoffee, &c, shall not be avoided thereby ; as if a man make a feoffment, upon condition that the feoffor go to the city of *Paris* about the affairs of the feoffee and presently after the feoffor die, so as that it is impossible, by the act of God, that the condition should be performed, the estate of the feoffee is nevertheless become absolute. But if such condition be added to an *executory contract* : as if there be a bond, recognizance, and the like, with condition that the obligor shall appear the next term in such a court ; if, before the day, the obligor or conusor die, the recognizance or obligation is saved. And the reason of this diversity is, because the estate in the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent ; namely, the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken, until there be a default in the obligor. And, therefore, in all cases, where a condition of a bond, recognizance, &c, is possible at the time of the making of the condition, and, before the same can be performed, the condition becomes impossible, by the act of God, or of the

[* 265.]

the

[* 266.]

Fitzh. Oblig.
13. Bro. tit.
faits 37.
Plowd. 32.

* the law, &c. there the obligation is saved. But if the obligation of a bond, &c. be impossible at the time of making the condition, the obligation, &c. is single ; as if a man be bound in an obligation, &c. with condition, that, if the obligor do go from the church of St. Peter, in *Westminster*, to the church of St. Peter, in *Rome*, within three hours, the obligation shall be void. Here the condition is void and impossible, and the obligation stands good. And the law is the same in case of a feoffment in fee, with condition subsequent, that the feoffee shall go as aforesaid, the estate of the feoffee is absolute, and the condition, impossible and void.

But, in this respect, there is a distinction between a condition of this kind that is *precedent*, and such a condition *subsequent* ; for, in the former case, no estate or interest will grow upon it : as if a man make a lease for life, upon condition that, if the lessee go to *Rome*, as aforesaid, then he shall have a fee : here the condition precedent is impossible and void, and therefore no fee simple can grow to the lessee.

[* 267.]

And a distinction is also taken upon bonds, *recognizances, and executory contracts, where the impossible condition is part of the bond, recognizance, or contract, and where it is indorsed or underwritten ; for, in the former case, the instrument thereby becomes void.

Pullerton v.
Agnew. 1 Salk.
172. Bro. tit.
faits 37.

Therefore, where, on a *scire facias* against bail, reciting a recognizance taken in the time of King *William the Third* ; wherein the condition was, that the defendant should render his body *Prisonæ Mar. Maresch. Domine Regine nunc* : it was urged, that the condition was impossible, and in consequence the recognizance single. *Et per Holt*, Chief Justice, where the condition is underwritten or indorsed, there *that* is only void, and the obligation is single ; but where the condition is *part of the lien itself*, and *incorporated* therewith, if the condition be impossible, the obligation is void.

We must carefully distinguish between conditions annexed to contracts or agreements, and circumstances annexed which seem to import conditions, but which are modal only, neither suspending, disannulling, nor altering the obligation of them, but only relating to the manner of performance : as that an agreement shall

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* shall be performed at a certain day, or in a certain place. [* 268.]

Thus, if a man have land let out on lease, and enter into an engagement for sale thereof, upon condition of its being freed at a certain day; such a clause neither suspends, nor disannuls the obligation of the agreement, but only amounts to a stipulation, by which the seller puts off the delivery of the thing sold, till it is at liberty, which he engages it shall be at a certain time. So, if two persons enter into a contract for sale of an estate, and the conveyances are agreed to be made, and the purchase money paid at such a place and time: the obligation of the agreement binds the parties from the moment it is entered into, and the time and place are only circumstances that affect the performance of the engagement. Of this nature also are all collateral or incidental circumstances, attending agreements for sale of land, &c.

Noy's Maxims, 89.

Such statements do not import conditions, whereby the parties are to be considered as contracting on the ground of a strict compliance; but are mere circumstances that admit of compensation. And in this respect * our law proceeds upon the same principles as the Roman law. For if one had land engaged, and sold it upon condition of freeing it at such a time; in this case that law allowed the buyer to have an action against the seller, to force him to free his land at the time appointed, or let him into possession. *Nam si id actum est, ut omni modo intra Kalendas Julias venditor fundum liberaret, ex erupto erit actio, ut liberet; nec sub conditione eruptio facta intelligetur: veluti si hoc modo eruptor interrogaverit, erit mihi fundus eruptus, ita ut intra Kalendas Julias liberet? vel ita, ut intra Kalendas a Titio redimas? Si vero sub conditione eruptio facta est non poterit agi, ut conditio impleatur.*

[* 269.]

Dig. l. 18, tit. 1. De contract. erupt. &c. leg. 41, init.

Thirdly. Contracts and Agreements are either written or unwritten.

This distinction between written and unwritten contracts or agreements, seems to have originated with the statute of frauds and perjuries, which was passed in the 29th Car. 2. and was made to prevent persons from swearing *verbal* agreements upon others, and thereby charging the parties in equity to perform them, though

Quære, if before statute of frauds, mere parol agreements were favored? Treat. Eq. 18, 19.

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[* 270.]
29 Car. 2. c. 3.

though the agreements had * never been made. To this intent the statute enacts, "that no action shall be brought, whereby to charge any person upon any agreement made upon any consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized."

In observing upon the effect and operation of this statute, I shall first consider what has been the construction of the words in the order as they stand, and, secondly, what are the exceptions out of the statute.

The first words then are, "no action shall be brought to charge any person." And hereupon it is observable, that, although by these words, suits in *Chancery* for the specific execution of contracts or agreements are not expressly prohibited, yet, courts of equity, * upon a principle which will be hereafter explained, were, for the most part, consequentially, thereby deterred from retaining suits upon contracts or agreements not made conformable to the statute, unless in cases where some circumstance intervenes, whereon an equity may be raised, notwithstanding the requisitions of the statute are not complied with.

[* 271.]

The next words that occur in this clause of the statute of frauds, are the words, "*any agreement, &c.*" And hereupon it has been held, that, although the words of the statute be general, namely, "upon any agreement made upon any consideration of marriage, or upon any contract or sale of lands, &c." which phrase is sufficient, in point of extent of operation, to comprehend *all* agreements, and *all* contracts; yet as, in the true construction of this, as of every other statute, the end and intent of the makers of it is to be considered, and that was to prevent frauds and perjuries, all contracts and agreements which, though not in writing, are *in their own nature* free from all danger of introducing fraud or perjury, are out of the purview of this statute.

Upon

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* Upon this ground it has been determined, that a judicial sale of an estate under a decree, is clearly out of the mischiefs intended to be prevented by the statute: therefore, where A. being likely to die, made a conveyance of a real estate in favor of a charity, and then made a will, by which he gave 3000*l.* (the exact value of that land) and also 250*l.* to the same charity, and gave the estate to D. (wife of B.) and C.—A bill in *Chancery* was brought for an account, and for a settlement of the estate under the will; and a decree was had thereupon, and the master was thereby directed to receive a scheme for carrying the conveyance into execution, the foundation of part of which was, to consider in what way the money should be laid out, and a perpetual fund created for maintenance of the charity. The master reported a scheme for laying out the 3000*l.* in the purchase of lands, and the 250*l.* in other lands convenient for building a charity school. Then the case was set down for the charity to be heard on the matter reserved; and the court made a decretal order, confirming the master's report, and ordering that the scheme should be approved of, and the other matters therein carried into * execution: none of these directions were opposed, but they were all acquiesced under by B. and D. who survived him. After her (D.'s) death, an information was brought in behalf of the charity, together with the administratrix of D. to have this purchase carried into execution by the aid of the court, against the devisee of the heir at law of D. and the infant son of C. the co-devisee with D. And, it being objected that there was no agreement signed pursuant to the statute of frauds, one question was, whether the transactions that passed in life of D. and C. amounted to a binding agreement on those parties for the sale of the land? and Lord *Hardwicke* was of opinion, that here was such an agreement as the court ought to execute, notwithstanding the statute of frauds; this being a judicial sale of the estate, which took it entirely out of that statute.

The principle upon which the preceding case rests, is this; the order of the court was not interlocutory, but made part of the decree, as it always does on the matter reserved, though made at another day; and it includes, as well the carrying the purchase into execution, as the establishment of the charity,
U
amounting

[* 272.]

Att. Gen. v.
Day, 1 Vcz.
218.

[* 273.]

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[* 274.] * amounting to a decree for the conveyance of the estate on one side, and payment of the money on the other; and the purchaser may be prosecuted for a contempt, in not obeying the order.

Per Lord
Hardw. 1 Vez.
221.

Upon the same principle it is held, that purchasers before the master are out of the statute; and, therefore, the court of *Chancery* will, in such cases, carry into execution, against the representative, a purchase by a bidder before the master without the bidder's subscribing, after confirmation of the master's report that he was the best purchaser: the judgment of the court taking such cases out of the statute.

Ibid.

So, if the authority of an agent, who subscribes for a bidder before a master, cannot be proved, yet, if the master's report can be confirmed, the court will carry it into execution, unless there be some fraud; for it is all exclusive of any defence that may still be set up on the other side.

Cox v. Peck,
Brown's Rep.

[* 275.]
Chan. 1788,
fol. 334.

And Lord *Thurlow* was of opinion, where the attorneys, concerned in a suit by a first mortgagee for a foreclosure, agreed, with * respect to the final decree, that the estate should be sold, the first mortgagee paid her principal and interest, and the remainder paid to the second mortgagee, but that the former should, in the mean time; take a decree; that, if the first mortgagee made an improper use of the decree, this agreement, though by parol, might be read, on an application to open the foreclosure, as an agreement relative to a decree, the attorneys being competent to make agreements relative to the order of the court. And upon that ground his lordship, on an appeal from the *Rolls*, admitted the evidence of it *de bene esse*, although it had been rejected by his honor, on the ground that the agreement was not in writing, and, therefore, void under the statute of frauds.

1 P. Will. 714.

And an agreement with the court of aldermen, (who are guardians of city orphans, and without whose leave no man can marry such orphan but under pain of imprisonment) though by parol only, and without writing, was held good: this being an institution that existed previous to the statute.

The next words that we meet with, in the clause
now

now under discussion, furnish a *description of the subject of an agreement, *viz.* “made upon any consideration of marriage,” or, “upon any contract or sale of lands, tenements, or hereditaments.”

[* 276.]

And, upon this part of the clause it is necessary to observe,

First, That whether the contract or agreement originate with reference to a marriage, or a sale, or the like, the construction of the statute, as applied thereto, will be the same.

Secondly, That the statute goes equally against an agreement for making a mortgage of a real estate without being in writing, as against an agreement for a purchase if not in writing; for as the latter can be no lien, so neither can the former be a security.

Per Lord
Hardw. 3 Atk.
4.

Then come the following words, “or upon any agreement that is not to be performed within the space of one year from the making thereof.” And hereupon it has been held, that this part of the clause in question, does not extend to any agreement respecting lands or tenements.

Hollis v. Edwards, 1 Vern.
159.

* The legislature then proceed to the enacting the provision, made by the statute, for securing persons from the mischiefs meant to be prevented, *viz.* “Unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized.”

[* 277.]

These words of the clause have afforded three points for legal discussion, namely,

First, As to what was meant by the legislature, when it required “some note or memorandum (of every agreement) in writing.”

Secondly, As to what circumstance will amount to a signing.

Thirdly, As to what persons *must sign*.

And as to the first point, it has been held, that, as well *marriage* agreements as others, where, on a treaty for a marriage or any other treaty, the parties come to an agreement, but the same is never reduced into writing,

[* 278.]

ing, nor * any proposal made for that purpose, so that the parties rely *wholly* on their parol agreement; neither party can compel the other to a specific performance, for the statute is directly in their way.

Countess Mon-
tacute v. Sir
George Max-
well, 1 P. Will.
618 Pre. Chan.
§ 26.

And, therefore, where a bill set forth that the defendant, before his intermarriage with the plaintiff, did promise that she should enjoy her own estate to her separate use; that he had agreed to execute a writing to that purpose, and had instructed counsel to draw such a writing; and that, when they were to be married, the writing not being perfected, the defendant desired this might not delay the match, in regard that his friends being there, it might shame him, but engaged that, *upon his honor*, the lady should have the same advantage of the agreement as if it were in writing drawn in form by counsel, and executed; and that thereupon the marriage took effect: it was held, on a bill for specific execution, that, where there was no fraud, the plaintiff relying solely upon the honor, word, or promise of the defendant, the statute making these promises void, equity would not interfere; and that the circumstance of the instruction having been given * to counsel for preparing the writings was not material, since, after they had been drawn and ingrossed, the parties might have refused to execute them.

[* 279.]

But it seems to have been formerly doubted, whether, if it were charged that the agreement was stipulated to be put in writing, this circumstance would not be a sufficient ground for excluding the statute from attaching upon the agreement.

Seale v. Morris,
2 Ca. Ch. 125.

For, in the case of *Seale and Morris*, which arose on an agreement that the defendant should assign a term of years in his house and plate, and certain vessels of beer for two hundred guineas, one guinea to be paid in hand as earnest of the bargain, and nineteen guineas more three days afterwards; and wherein part of the bargain was, that it should be executed by writings by a certain time; the defendant pleaded the statute, and that it was a parol agreement, and that none of the goods had been delivered; that therefore there ought to be no relief in law or equity; but he confessed the receipt of twenty guineas, and offered to repay them: the Lord Keeper said, it was clear the defendant ought to repay the money, for it was charged that the agreement was to have been

been * put in writing; and his lordship over-ruled the plea.

[* 280.]

So, in the case of *Hollis* and *Whiteing*, which was a bill to have the execution of a parol agreement for a lease of a house, setting forth that, in confidence of this agreement, the plaintiff had laid out and expended very considerable sums of money; the statute was pleaded, and the plea allowed. But the lord Keeper said he was of opinion, if the plaintiff had laid it in his bill that it was part of the agreement that the agreement should be put into writing, it would have altered the case, and possibly have required an answer.

Hollis v. Whiteing,
1 Vern. 151.

But, in the cases of *Hollis* and *Edwards*, and *Dean* and *Izard*, wherein bills were exhibited to have an execution of parol agreements touching leases of houses, which set forth that, in confidence of these agreements, the plaintiffs had expended great sums of money in and about the premises; and where the agreements were respectively laid to be, *that it was stipulated the agreement should be reduced into writing*, the statute was pleaded. And the Lord Keeper said, that the difficulty which arose upon this act of parliament was, * that the act made void the estate, but did not say the agreement itself should be void; and, therefore, though the estate itself were void, yet possibly the agreement might subsist, so that a man might recover damages at law for the non-performance of it; and if so, he would not doubt to decree it inequity. And his lordship directed that the plaintiffs should declare at law upon the agreements, and that the defendants should admit the agreements, so as to bring this point in judgment at law, and then, he said, he would consider what was further to be done in the case.

Hollis v. Edwards, *Dean v. Izard*, 1 Vern. 159 S.C. 1 Eq. Ca. Abr. 19. Pl. 1, 2.

[* 281.]

There being no further proceedings on this case, it is reasonable to suppose that it was held, the action could not be maintained at law.

And the determination in the case of *Bawdes* and *Amhurst*, seems in a great degree to warrant this conclusion: for, in that case, the agreement was actually put into writing by way of memorandum, and the completion thereof prevented by the death of one of the parties. The circumstances of this case were as follow: a marriage treaty was depending,
and

Bawdes v. Amhurst, Prig. Chan. 402.

[* 282.]

Vide 3 Atl.
504. This case,
referred to and
approved by
Lord Hard-
wicke so far as
the reasons there
given extend.

Hawkins v.
Holmes, 1 Will.
770, et vide
Lowther v.

[* 283.]
Carrill, 1 Vern.
221. et Whaley
v. Baganal,
6 Brown's Par.
Ca. 45.

* and the intended husband, and the young lady's father, went to a counsellor's chambers to have a settlement, in consideration of the portion the father proposed to give, drawn; at this meeting, minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk, to be drawn up in form. The next day the father died, and the day following the marriage was solemnized. And this agreement, notwithstanding the preparations, was held, by Lord *Cowper*, to be within the statute of frauds and perjuries, it being no agreement, but only preparatory heads which were afterwards to be drawn into form. It might, therefore, have received several alterations or additions, or been entirely broke off upon some further enquiry or information of the party's circumstances.

And, in a subsequent case, the decision was still stronger as to this point. In the instance alluded to, the plaintiff agreed with the defendant to sell him a house for 640^l. and, by consent of both parties, an attorney was employed to make a draft of the conveyances; which the attorney accordingly prepared and sent to the defendant, who made several * alterations therein in his own hand-writing, and delivered it back to the attorney to be engrossed. Then a time was appointed for the parties to meet at a tavern to execute the writings, and for the defendant to pay the money. The plaintiff and his attorney went to the tavern, and the plaintiff there executed the writings. Then the plaintiff, having got the conveyance registered, the estate being in *Middlesex*, brought his bill against the defendant to compel him to pay his purchase money. The defendant pleaded the statute of frauds. And although the agreement was actually put into writing in the draft of the conveyance, which had been altered by the defendant with his own hand, yet it was held that the defendant was not bound, he not having signed the agreement.

Secondly, As to what shall be a signing within this clause of the statute.

Vide Buck-
house v. Crossy.
2 Eq. Ca. Abr.
32, Pl. 44.

And hereupon it has been said that, if the name of the party against whom the suit is preferred, be in any way found upon the instrument, this will be a sufficient signing within the statute, *if the intent of the parties was that the person should be bound*, and an acceptance

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* acceptance is shewn on the other side. And, therefore, where a mother was not a party to a deed of articles made on her daughter's marriage, but was proved to have known and agreed to them, and to have been privy to the actual marriage which took place upon them, and signed them as a subscribing witness : this was held, by the Master of the Rolls, and afterwards by Lord *Hardwicke*, to be a sufficient signing, within the spirit, and also within the words of the statute. And the mother was decreed to perform her part of the agreement.

But, in the before-mentioned case of *Hawkins and Holmes* in which the defendant pleaded the statute of frauds and perjuries, and said, " that neither he, nor any by him lawfully authorized, signed any writing, agreement, memorandum, or note, in relation to this purchase, or whereby the defendant in any wise agreed thereto." It was objected, that the defendant's altering the draft with his own hand, was a signing, it not being material to what part of the draft his hand was set. But the chancellor said that, unless in some particular cases, the parties signing the agreement, was absolutely necessary for the * completing of it ; and to put a different construction on the act, would be to repeal it.

This point was submitted to the opinion of the court of *Exchequer*, in the case of *Stokes* against *Moore et Uxor*, and was there decided upon somewhat narrower ground than that taken by Lord *Hardwicke*, in the before-mentioned case of *Buckhouse and Crossly*. The former case arose on a bill for the specific performance of an agreement for the renewal of the lease of a house by M. and his wife to S. There had been some difficulty about the terms of renewal, but at length they came to an agreement ; and M. being called upon by S. to name a person to prepare the lease, named a Mr. T. for that purpose, and wrote certain instructions from whence the lease was to be prepared in these words, namely, " the lease renewed, S. to pay the king's tax, also to pay M. 24*l.* a year, half-yearly ; S. to keep the house in good tenantable repair, &c." To this bill the defendants pleaded the statute of frauds ; and that plea having been ordered to stand for an answer, with liberty to except, and the defendants having then by
their

[* 284.]
Weiford v.
Beezley & Vez,
6. 1 *Wilson*
118.

Supra.

[* 285.]

Stokes v. Moore
et Ux. vide
1 *P. Will.* 771,
note 1, last
edit.

* 286.]

their answer admitted the * written instructions ; one question made on the hearing of the cause was, whether there was a sufficient signature by M, to take this agreement out of the statute of frauds. And it was held by the court unanimously that there was not ; for, that the signature required by the statute was to have the effect of giving authenticity to the whole instrument ; and where the name was inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found : as in the formal introduction to a will. But it could not be imagined that the name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required.

Thirdly, as to what persons must sign an agreement.

And it seems sufficient, that the party against whom the bill is brought, or suit preferred, has signed the agreement ; if it can be proved that the party signing had evidence in his power to shew an acquiescence in the agreement by the other party, who does not sign, * either by some writing under his hand or some act done from which the law will infer the agreement.

Thus where A. sold houses to B. for two thousand pounds ; and A. drew up a note of the agreement in writing, which B. signed, but A. did not sign ; it was objected, on a bill by A. against B. to compel him to a specific execution of this agreement, that this was within the statute ; for, the note bound not him that did not sign it, and they must be both, or neither, bound in equity. But it was decreed, that B. was bound thereby ; for, A.'s drawing up the agreement in his own hand, and procuring B. to sign it on his part, made the signing of B. not only a signing for himself, but also a signing as authorised by A. to close the agreement ; and, therefore, as, if B. had come into a court of equity against A. the court would have decreed the agreement against him, so would it likewise decree it against B. on a bill filed by A.

And a letter will, in equity, amount to an agreement, and be binding on the person signing it, if another

Vide Halfpenny v. Ballet,
2 Vern. 373.
S. C. 1 Eq. Ca.
Abr. 20, Pl. 6.
et infra.

[* 287.]

Hatton v. Gray,
1 Eq. Ca. Abr.
21. 10. S. C.
2 Chan. Ca.
164.

OR AGREEMENTS.

ther person, by *acting upon it*, * shew his acceptance of the propositions therein contained.

[* 288.]

Thus where, on a treaty of marriage between A. and B.—B.'s father promised to give her 4000*l.* but, when he perceived A. and B. to be mutually engaged, began to recede from his promise; whereupon A. got a letter wrote to the father by a friend of his, desiring him to be plain and ascertain what portion he would give A. with his daughter, and he agreed to give 1500*l.* down and 500*l.* more at his death, if she should have issue; and the marriage was had. It was held, that this letter was a good agreement binding upon the father, and that A. upon his marriage, became well entitled to the 1500*l.* agreed by the father, under his own hand, to be paid as a portion to his daughter.

Moor v. Hart,
2 Rep. Chan.
147. S. C.
1 Vern. 201.
Et Warkford
v. Foltherly,
2 Vern. 322.
S. C. Freeman.
291.

So, where a father wrote a letter signifying his assent to the marriage of his daughter with J. S. and mentioning that he would give her 1500*l.* And he afterwards, by another letter, upon a further treaty concerning the marriage, went back from the proposals of his letter; and then, at some distance of time declared, that he would agree to what was * proposed in the first letter. This letter was held a sufficient promise in writing within the statute of frauds; the last declaration having set the terms in the letter up again, and J. S. having shewn, by his marriage, of the daughter, his acceptance of the terms.

Bird v. Blossie,
2 Vent. 361.

[* 289.]

Again, where A. possessed of tythes by a demise for twenty-one years, covenanted, in consideration of 350*l.* to convey them to B. his executors and assigns; and then C. treated with B. for them, and B. sent his son and two other persons with a letter to C. wherein B. said, "that if he parted with the tythes, it should be on the conditions therein particularly mentioned." C. accepted of the terms, and the next day sent his attorney to acquaint B. therewith, and B. delivered to the attorney a copy of A.'s agreement, and appointed a day for executing the same; but, in the mean time, B. went to A. and settled a conveyance from A. It was decreed, that B. should perform this agreement with C. for the letter took the case out of the statute of frauds, as being an agreement signed by the party to be charged with the same; and there was no need, the lord keeper said, for its being signed by both parties.

Coleman
v. Upcot,
5 Vin. Abr.
527. Pl. 17.
S. C. 2 Eq. Cas.
Abr. 45. 36.

[* 290.]
 Ayliffe v. Tra-
 cey, 2 P. Will.
 65. 9 Mod. 3.

* But a letter from a father to his daughter, by which he gave her 3000*l.* portion, but which was not shewn to the man who afterwards married the daughter, was not considered as entitling the son-in-law to a decree for the 3000*l.* although he had married the daughter. The reason for which seems to have been, that the son-in-law could not be considered as having, by the marriage, accepted an agreement of which he had no knowledge.

Seagood v.
 Meale, et al.
 Pre. Chan. 560.
 S. C. 2 Eq. Ca.
 Abr. 49. 20.
 Strange 426.
 Et vide Clerk
 v. Wright.
 1 Atk. 132.

Such a letter cannot be set up as an agreement, unless it contain the precise terms of the contract at large ; and, therefore, on a bill for a specific execution of an agreement for the purchase of nine houses which were in mortgage for 150*l.* stating that the vendor had agreed to sell them to the vendee for such a sum of money, and had sent a note to the mortgagee to the effect following, *viz.* Mr. C. pray deliver my writings to the bearer, I having agreed to dispose of them ; it was held, upon the question, whether this letter or note would bring the case out of the statute, that it would not ; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party ; for it did not mention * the sum that was to be paid ; nor the number of houses that were to be disposed of, whether all, or some, or how many ; nor to whom they were to be disposed of ; nor did the letter mention whether they were to be disposed of by way of sale or assignment of lease ; and, therefore, all the danger of perjury which the statute was meant to provide against, would be let in to ascertain this agreement.

[* 291.]

Supra.

So, in the case of *Montacute* and *Maxwell* before-mentioned, a letter from Sir *George* to his lady, written after the marriage, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command, was insisted upon as an evidence under his hand of the agreement before the marriage, which would take the case out of the statute. But the chancellor, as to the latter part of the proposition, said, that the letter consisted only of general expressions ; that, indeed, had it recited or mentioned the former agreement, and promised the performance thereof, it had been material.

Having considered the construction of the several parts of the clause in the statute of frauds relative to agreements,

agreements, the next object * I shall advert to is, the several grounds upon which courts of equity have considered parol agreements binding, notwithstanding this statute. And one ground upon which this equity has been raised is, that though this statute has provided that no agreement on marriage, or for the purchase of lands, shall be good, unless signed by the party to be bound, or some person by him authorized; yet, on all the questions upon a statute against fraud, the end and purpose of making it is considered; which, in this instance, is to prevent frauds and perjuries, and not to vacate bargains fairly and honestly made. Therefore courts of equity considered themselves as unrestrained thereby in the latter cases: because the parties are in conscience bound to perform such agreements, and ought not, in such instances, to be permitted to take advantage of the want of any solemnities, whether imposed by common law or statute: with this view courts of equity have considered agreements, wherein there has been no danger of fraud or perjury, as out of this statute. And, therefore, if, on a bill, filed by either vendor or vendee for a specific performance of a parol agreement, setting forth the substance of it in the bill, the defendant, by his answer, admit the facts as stated in the bill, * this takes the agreement entirely out of the mischief pointed at by the statute; and a court of equity will decree it, because, the defendant confessing the agreement, there can be no danger of perjury from a contrariety of evidence. Besides the agreement is in writing, the answer confessing it.

And if the party himself die, his heir will, it seems, be bound on a bill of revivor; the principle going throughout, and binding the representative equally as the principal.

And, upon this principle, equity will decree an agreement on evidence of its having been confessed by a party to it, although it be denied by his answer. Therefore, where an agreement was proved by one witness only, and positively denied by the defendant's answer, but there was the circumstance of the defendant's having confessed the agreement proved in the cause: the master of the Rolls offered to direct an issue to try the agreement if the defendant desired it; but he declined that, unless his honor would make an order that his answer should be read on the trial, which his honor refused to do, there being circumstances to cor-
roborate

Symondson v.
Tweed, Pre.
Ch. 374. S. C.
Gillb. Rep Eq.
35. Croyston
v. Eanes,
Pre. Ch. 208.
Lord Vaughan
v. Morgan,
[* 293.]
Finch 138.
et vide Hodgson
v. Hutchenfon,
5 Vin Abr. 522.
Pl. 34. 2 Eq.
Ca. Abr. 47.
1 Vez. 441.
3 Atk. 3.
10 Mod. 404.
Per Lord
Hardwicke,
1 Vez. 222.

Only v. Walker,
3 Atk. 407.

[* 294.] corroborate the evidence of *the single witness. And his honor decreed the agreement to be carried into execution.

And there are cases wherein both courts of law and equity (for the rule is the same in both) will let in proof of parol agreements, as circumstantial evidence to control written ones, to prevent the fraud taking place which would in such cases arise from insisting, that something had got into writing which deprived the party of the benefit of detecting this fraud. Thus the defendant may, on a bill for specific performance of a written agreement, insist upon a subsequent parol agreement between the parties by which the former has been since discharged.

Legal v. Miller,
2 Vez. 299.
Et vide Goman
v. Salisbury,
1 Vera. 240.

Thus where there was an agreement in writing for taking a house at 32*l.* *per annum* to be repaired by the owner, and, it being afterwards discovered that it must be rebuilt, that was done without cancelling the written agreement; but the tenant, apprized of the great expence the owner must incur, agreed by parol, that 8*l.* *per annum* should be added to the 32*l.* which was to have been given in case it had been only repaired: the court, on a bill by the tenant filed on the foot of the *written agreement (notwithstanding it was insisted that the written agreement should speak for itself, and that no evidence could be admitted to contradict it) received evidence of the parol agreement, and thereupon dismissed the bill with costs.

[* 295.]

Ibid.

But in the preceding case, the court, being satisfied from the parol evidence, that a specific performance of the written agreement ought not to be decreed, would not, on dismissing the bill, make a decree according to the agreement which the defendant set up; the master of the rolls saying, that it would be very hard upon a defendant, if (when a plaintiff unconscientiously brought him into a court of equity for the specific performance of a written agreement, and the defendant insisted on an agreement different from that the plaintiff set up, and the plaintiff replied to his answer and insisted on his former demand, and went into proof, and then, finding he could not have the decree prayed by his bill, resorted to that which the defendant set up) the court should decree against the defendant.

Another ground, upon which cases have been held to be

be out of the purview of this * statute is, not so much on the principle of there being no danger of perjury from carrying them into execution, as that the statute ought not to be construed so as to create or promote fraud. And, therefore, where an agreement has been carried partly into execution, and one party has incurred expence in improvements; although a controversy may afterwards arise between the parties as to the precise terms, yet, if they can be made out satisfactorily to the court, the agreement, though resting on parol evidence, will be decreed, notwithstanding variety of evidence adduced in such cause: for, in such case, in order to prevent one side from taking advantage of the statute to be guilty of fraud, and thereby pervert its object, a court of equity considers his conscience as bound, and itself as, thereby, clothed with jurisdiction upon the ground of the equity arising from the circumstance of performance on one part; and, upon that foundation, retains the suit notwithstanding the statute, *as not within the purview of it*. Therefore a lessee, in the case of a parol lease † of ground for a great number of years, having begun to build, will have his bargain completed. The reason is, that the lease is in part executed on the part of the lessee, * and, therefore, the lessor shall not take advantage of his own fraud, to run away with the improvements made by another.

[* 296.]

Pre Chan. 519. Upon similar principles the registering acts have been considered as not protecting purchasers, with notice of preceding incumbrances not registered, from such preceding incumbrances, although their purchases be registered. 1st, Because, such statutes, being made to prevent fraud, ought not to be so construed as to encourage it. 2dly, Such

[* 297.]

statutes are considered as leaving the

subjects to which they apply, open to all equity,

† 2 Eq. Ca. Abr. 48. 16. 5 Vin. Abr. 322. Pl. 38. Et Pre. Ch. 56. 1. Et Foxcroft's case in Dom. Proc. cited Pre. Ch. 519. Gilb. Rep. Eq. 4. et ibid. 11, where said, that the lessor, in this case, when dying declared, that he ought to have made a lease in writing, but the heir told him he should not discompose himself, for he would supply it; whereby, and by other fraudulent means, the lessee was prevented from suing the lessor. Sed vide Floyd v. Buckland, 2 Freem. 268. This point expressly to be determined on the ground of performance.

And, under similar circumstances of money laid out in pursuance of a parol promise of a lease, a specific performance was decreed; although the terms were not precisely stipulated between the parties, at the time of the agreement.

Thus where the plaintiff's bill was to have a lease according to the defendant's promise, the plaintiff having laid out money upon the estate intended to be demised: the defendant insisted on the statute, there being no agreement in writing, *nor any certain terms* agreed upon; and averred, that what the plaintiff had laid out was not on lasting improvements, but admitted that the plaintiff had built a stable which cost him 10*l*. It was proved that the defendant told the plaintiff his word was as good as his bond, and promised the plaintiff

Anonymous.

2 Eq. Ca. Abr. 48. 17. 5 Vin. Abr. 523. 40.

tiff a lease when he should have renewed his own from his landlord. *Et per curiam*, the defendant is guilty of a fraud, and ought to be punished for it; and a lease was decreed to the plaintiff, though the terms * were *not expressed* by the parties; for then it should be in the plaintiff's election how long he would hold it, and he elects to hold it during the defendant's term at the old rent.

[* 298.]

Halfpenny
v. Baillet,
2 Vern. 373.
Et vide S. C.
Prec. Chan. 404,
405.

And, upon the same principle, namely, to prevent fraud, the master of the Rolls decreed an agreement and payment of a portion in the case of *Halfpenny* and *Baillet*. That was a case wherein, on a marriage treated upon between the plaintiff and the defendant's daughter, an agreement was reduced into writing and signed by the plaintiff, and delivered to the defendant to be signed by him, but denied in the defendant's answer to have ever been signed by him, he having torn it, being dissatisfied therewith in some particulars. But his objections not being to any material parts of the agreement, and he having permitted the plaintiff to court his daughter, and the marriage having been afterwards had, and he not having declared his dislike until asked for payment of the portion, and having permitted the young person to live with him, the master of the Rolls decreed a specific performance; considering the defendant's conduct as founded in fraud.

[* 299.]
Wanchford v.
Fotherley,
2 Freem. 201.

* So, where the bill was for a portion upon marriage of the plaintiff with the defendant's daughter, it appeared that there was no note or agreement in writing signed by the defendant for the payment of it, but that a letter had been written to the plaintiff by a third person offering a portion, which it was in proof was done by the defendant's consent, and that a treaty for a suitable settlement was had with him; but the matter being long in suspense, the marriage took place in the mean time. The court, although it appeared that the defendant, before the parties went to church, declared he would give them nothing, and the statute of frauds was insisted upon, decreed for the plaintiff; considering the countermand as nothing after the young people's affections were engaged.

And possession, delivered in pursuance of an agreement, is also such a degree of performance, as is sufficient to take a contract out of the statute, although the purchaser has not invested money upon the premises. Because the mischief the statute meant to prevent existed in such agreements only, no part whereof were
carried

carried into execution, and which were set up merely by parol ; therefore, * execution on one part has been looked upon as so far conclusive, as to induce the court to decree an execution on the other part, rather than the agreement, so far as it has been already carried into execution, should be destroyed.

[* 300.]

Thus, where A. seized of lands, agreed with C. to sell the same to him, and a short note was drawn up of the agreement (but not signed by either party) and, soon after the agreement, C. put in his cattle and made encroachments on A.'s other lands ; whereupon A. desired to undo the bargain, but C. refused to consent to that, and then A. sold the land to D. Upon a bill filed by C. for a specific performance, the statute of frauds was pleaded. *Et per curiam*, Inasmuch as possession was delivered according to the agreement, the bargain was executed, and a specific performance was decreed.

Butcher v.
Stapely, et al.
1 Vern. 363.

So where A. having mortgaged the lands in question to B. for 750*l.* died, leaving an infant his heir, and, it being for the advantage of the infant that the estate should be sold, an act of parliament was procured for that purpose, and a public survey was held for * the sale of it, at which C. bid 1250*l.* for it, but D. bid 1250*l.* and signed the contract. D. soon afterwards died, and then C. offered 1250*l.* again for it, which was accepted and agreed unto ; and thereupon conveyances were directed to be made, and possession actually delivered. C. afterwards got an assignment of the mortgage which was ante-dated, and then, pretending that he took possession under the mortgage he filed a bill to compel the infant to redeem or be foreclosed ; and there was a cross bill to compel C. to compleat his purchase. And the taking possession under the mortgage being disproved, the simple question was, whether upon the circumstances of this case the agreement, although only by parol, should be carried into execution against C. And the lord keeper decreed that it should, and that C. should proceed in the purchase, in case a good title could be made.

Pyke v. Wil-
liams, et c con-
tra. 2 Vern. 455.

[* 301.]

Again, where a bill was filed to have a discovery of a parol agreement for the sale of copyhold lands, and whether the defendant did not pay 200*l.* part of 2300*l.* being the purchase money, and if the plaintiff did not give the defendant a note acknowledging the receipt of the 200*l.* and promise to make a

Borret v.
Gomelert.
Bunbury's Rep.
94. in scacario.
2 Eq. Ca. Abr.
48. 17.

good

OF THE NATURE OF CONTRACTS

* 302.]

* good title, and whether he did not bring his writings before the defendant's counsel who approved of the title, and also to have a specific performance. The defendant pleaded the statute of frauds. But the plea was over-ruled, and it appearing in proof, at the hearing, that there was no fraud, that the lands were worth 2335^l. that defendant had done several acts of ownership, as ordering in bricks, fishing in ponds, &c. and had made frequent promises; the court decreed for the plaintiff.

Vide *supra*,
et S. C.
1 Vern. 365.
Sed note, the
chancellor
thought that
the purchase of
D. in this case
was a contriv-
ance between
him and A. to
avoid the bar-
gain; so quære.
Pie. Chan. 519.

And, in such cases, the taking possession under the agreement, will be deemed notice to a subsequent purchaser. Thus it was held, in the case of *Butcher* against *Stapely* before-mentioned, that C.'s putting in his cattle and taking possession, was notice to D.

Nor can such agreement, so executed on one part, and followed by an enjoyment accordingly on the other, be so far impeached as to lay the party open to an account for the profits he has received under the enjoyment; because, it was said by the court, that would be much harder than setting aside the agreement at first for want of writing.

[* 303.]
Lady Herbert
v. Earl Powis,
et al. Brown's
Par Ca. vol. vi.
102.

* And in the case of *Lady Herbert* and the *Earl of Powis* and others, determined in the house of Lords on appeal from a decree of Lord *Northington* an agreement by parol, made by an agent of the earl's with *Lady Herbert*, that his Lordship should pay her 200^l. a year by way of annuity, in consideration that she consented to the appointment of a lady as guardian to her niece *Miss Herbert*, to be named by his lordship, with a view to place her in a situation wherein he might have access to her to pay his addresses, and with a person who in that character would consent to the match, whereby his lordship's title to the *Powis* estate, which was then disputable, being held only under the will of the last marquis, would be settled, she being niece to *Lady Herbert*, and heir at law to the *Powis* estate, was ordered to be carried into execution on his lordship's part; *Lady Herbert* having performed her part of the agreement by consenting to the appointment of the guardian, whereupon the marriage was had, and an end put to all litigation. And such consent, being the compromise of an intended lawsuit, was held to be a good consideration to support a promise in law, whereof the promisee might claim the benefit either by an action at law,

* or a suit in equity, as the nature of the case required:

Again; where, previous to the defendant's marriage, 500*l.* the property of his wife by a former marriage, was agreed to be assigned to trustees for her separate use during coverture, and to be applied after her death to such uses as she should appoint; and after the marriage a draft of an assignment was prepared, and corrections made in the husband's hand-writing; and he suffered her to receive the interest of it to her separate use during the coverture. These circumstances were considered by Lord *Hardwicke* as a part performance, and as taking the agreement out of the statute. His lordship observing that, if the statute were suffered to be pleaded to the discovery even of a parol agreement in such cases, it would be very mischievous.

Cutting down of timber likewise, is a part execution of articles, made on marriage, for settling an estate.

Payment of money is, in some cases, considered by the court of Chancery, as a part performance of an agreement. Thus, where * A. having occasion for money, came to a parol agreement, entered into on her behalf by her agent with B. that A. in consideration of a certain sum to be paid by B. should convey her lands, &c. to him and his heirs, subject to estates for life of C. and D. the purchase money to be applied as then stipulated: and B. in part of the agreement, paid A. several sums of money, for part of which he took her note, and for the other part of which he took her bond, till the agreement could be completed; and thereupon a lease of part of the lands purchased was renewed, *and the life of B.'s son inserted with the approbation of B. according to the agreement*, and then A. died. On a bill to compel a specific performance, filed by a creditor by simple contract against B. and the heir of A. the heir objected, that he was a stranger to the transaction, and that if any such parol agreement had been made, he was not bound thereby, in regard it was not reduced into writing, nor in any sort performed by A. in her life-time. It was sworn positively, that the money had been applied for, and absolutely paid upon the foot of the agreement. And Lord *Hardwicke*,

[* 304.]
Tay'lor v.
Beach. 4 Vez.
297.

Sidney v. Sid-
ney, 2 Ec. Ca.
Abr. 29. pl. 37.

Lacon v. Mer-
tins. 3 Atk. 2.
[* 305.]
Gilb. Chan.
231. 5 Vin.
Abr. 523. 40.

OF THE NATURE OF CONTRACTS

* 306.]

upon all the * circumstances of the case, decreed a specific performance.

Lord Pengall v.
Ross, 2 Eq. Ca.
Abr. 46. 12.
S. L. Leake v.
Morrice, 2 Ch.
Ca. 135. S. C.
1 Eq. Ca. Abr.
23. 20. Pre.
Chan. 505.

But where A. agreed with B. to make him a lease for twenty-one years, of lands rendering rent, B. paying A. 150*l.* fine, and B. paid 100*l.* in part to A.'s agent, which A. knew of, and ordered his own agent to prepare the lease, but before it was executed, A. repented and refused to grant it; B. having paid 100*l.* *earnest*, exhibited his bill for a specific performance: it was held, that this payment was not such a performance of the agreement on one part, as warranted the court to decree an execution on the other; because a parol agreement respecting lands cannot be good, within the statute, by giving money *in earnest*; for there must be something more than a bare payment on the one part, to induce the court to decree a performance on the other part, either by putting it out of the parties' power to undo the thing, or doing something that would be prejudicial to the party performing it; but the money was ordered to be refunded.

[* 307.]

Bacon's Abr. 74.
et Gilb. Ch. 231.
2 Chan. Ca. 36.

But it seems to be the better opinion, that * payment of money *alone* may be a part performance to take a case out of the statute. But the doubt in such case seems to have been, what shall be a proof of the receipt thereof as such. Thus far seems certain; if the defendant in his answer confesses the receipt of the money *for the purpose charged in the bill*; or if he denies the receipt as in part performance, and it be proved upon him by writing, as *by letter under his hand*, or other *written* evidence, he shall be obliged specifically to perform the whole agreement, because he has carried it in part into execution. But if the defendant confesses the receipt of the money, and says that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there, he turns the proof of the agreement on the plaintiff, and then, it is said, the plaintiff must prove the receipt of the money by the defendant for the purpose in the bill mentioned, by some written agreement.

Wise Gilb. Ch.
232. where
there is a pas-
sage which,

However, this appears to be in some degree questionable; because, in such case, the parol evidence is applied to the act of receiving, which is a consequence of and collateral to the act of contracting, and consequently

quently * affords a further evidence of the bargain, than the parol proof of such bargain only ; namely, an act done in pursuance of it, which furnishes a distinct fact, that appears to be the proper subject of discussion before a jury, who, in such case, would be competent judges of the credit of the parties, and might, by their verdict, decide, whether the payment of money was in part performance or not ; and thereby determine, whether the case was or was not within the exceptions taken out of the statute. *Sed quære.*

And in cases of earnest paid, an action of law may be brought, and damages recovered for non-performance, although there be no remedy in equity. The reason of which is, that where equity assists the common law, and enforces the performance of the agreement in specie, it does it upon important reasons ; namely, where otherwise there would be a great burthen and penalty upon the party, if having performed part, by which he himself has a loss, and the other a benefit, he should not have a reciprocal performance.

And an agreement by parol, part * performed, will be decreed against the heir of the vendor under it.

But as the principle which governs the court is, that the act, done in part performance, is presumptive evidence that the agreement was really made, it must be of such a nature, as the court is satisfied would not have been done, *unless on account of the agreement.* And, therefore, where a lessee agreed by parol to take a lease for a term of years certain, and continued possession on the credit thereof ; there being no writings to make out the agreement, it was held to be directly within the statute.

Marriage alone is not considered, in equity, as part performance of an agreement made between the parties themselves, although it is considered as such to bind a third person : as in the case mentioned before of a letter written by a father, promising to give such a fortune with his daughter to any one who should marry her, in which case a man, who marries on the encouragement of this letter, shall recover ; because the agreement is executed on his part as far as it can be, and can never be

[* 308.]
though possibly written, seems to warrant this observation.

[* 309.]
Lacon v. Martins, supra. Et vide Hawkes v. Hawkes, Finch 300.
Sanfum v. Butter, 1 Bac. Abr. 74. Per Lord Hardw. 3 Atk. 4. Smith v. Turner, cited Pre. Chan. 561. et vide Hole et White, cited Brown's Rep. Ch. 409.

Vid. Viscountess Montacute v. Maxwell, supra Sanfum v. Butter, 1 Bac. Abr. 74.

Pre. Ch. 561. et vid. Brown. Smith v. Gilborne, Strange 738.

[* 310.]

be undone after. The reason why * marriage alone is not looked upon as an execution of the one side between the parties, so as to take such case out of the statute, seems to be, that, if it were, the statute would be entirely evaded ; for all promises of this kind suppose a marriage had or to be had.

Lamas v. Eayly,
2 Vern 627 led
vide 5 Vin. Abr.
521. Pl. 32. et
2 Eq. Ca. Abr.
25. 10. both
which seem to
be the same case
as reported in
Vernon, and
re: the chan-
cellor's decree
on the ground,
that there was
no absolute nor
positive agree-
ment, the
words being
ambiguous and
uncertain; and
not on the
ground that the
forebearing by

[* 311.]
agreement to
do an act might
not be a part
performance,
and raise as
strong an equi-
ty to have the
benefit stipu-
lated in return
as an act done.

*Whaley v. Bu-
gnaill*,
6 Brown's Par.
Ca. 45.

And the fact of one party purchasing, desisting from his purchase in favor of another party on certain conditions stipulated, is not a part performance to take an agreement in favor of the party desisting, as to part of the lands purchased, out of the statute ; for, where A. being about to purchase a tolt of ground of B. and C. being also treating for the same premises, met together ; and it was proposed and agreed, that A. should desist and permit C. to purchase, he agreeing to let A. have, at a proportionable price, that part of the ground he desired ; and thereupon A. desisted, and B. completed his purchase ; and afterwards A. refused to perform the agreement : on a bill filed by A. upon the ground of the agreement's being in part executed, by his desisting from prosecuting his purchase, a specific performance was decreed, at the Rolls : but on appeal to the chancellor, the decree was reversed.

* Again : on a bill filed in the court of Chancery in *Ireland*, for specific execution of a parol agreement for the purchase of an estate, proof of the delivery of a rent-roll to the purchaser, altered and dated by the seller in his own hand-writing ; of his delivering the deeds to the purchaser's agent, to be compared with the rent-roll, and laying an abstract of his title, and a case thereupon before counsel, in which it was stated, that the purchaser had agreed with the seller for the purchase of the lands at twenty-one years purchase ; of his giving the purchaser a list of his debts which affected the estates, and authorizing him to apply to his creditors, to several of whom, and to other persons, the seller was charged to have written letters himself, informing them that he had agreed with the purchaser to sell ; and of his afterwards sending to the tenants to treat with A. as owner of the estate, for renewal of leases, and to cut down timber ; and to prevent the effect of an elegit against him, of his producing evidence before a jury that such agreement and purchase had been made, was held not to be sufficient, on the ground of a part execution, to take the agreement out of the statute of frauds : but the bill was ordered to be dismissed,
and

and that * order of dismissal affirmed on appeal to the [* 312.]
house of Lords.

And possession under a parol agreement, of how-
ever long standing, will not be a ground to establish it,
if it appear that the persons who made such agreement
had not a right to contract. As if an agreement for
partition be made by two husbands, of land belonging
to their wives, without the consent of the wives;
for they cannot thereby bind the inheritance of their
wives.

*Ireland v. Ritt-
tle, 1 Ask. 626.*

OF CONTRACTS OR AGREEMENTS, CONSIDERED AS SUCH IN EQUITY, ARISING OUT OF INSTRUMENTS, &c. HAVING A DIFFERENT EFFECT AT LAW.

EQUITY, which adverts to the substantial object of all contracts, independent of the forms which they assume, gives effect to the intent of the parties, by considering their acts as evidence of such a contract or agreement, as will produce what is stipulated. Concerning which two things are to be considered. First, What, in the view of a court of equity, amounts to a contract or agreement. Secondly, How it may be proved in equity.

First, It is clear that any kind of written contract, if it expresses the intent of the parties, to stipulate with a view to some particular thing collateral to the contract itself, will, in equity, amount to an agreement respecting * that thing ; although, in form, it assume a different character.

[* 314.]

Anonym.
Moscley 37.
1 Strange,
2 Vez. 373.
10 Mod. 517.
5 S. 9 Mod. 62.

Thus where the condition of a bond was, " in consideration of so much money in hand paid, to convey and assure certain lands ;" the master of the Rolls declared, that bonds of this nature were always considered, *in equity*, as articles of agreement, and decreed the condition to be specifically performed.

Aston v. Pierce,
2 Vern. 489.

So where A. on his marriage agreed to leave B. his wife 1000*l.* if she survived him ; and the drawing the marriage agreement was left to the parson of the parish, who made a bond from A. to B. in 2000*l.* conditioned to leave her 1000*l.* if she survived him : the question was, whether this bond, although released at law by the intermarriage, did not subsist as an agreement in equity, and entitle the plaintiff to a satisfaction out of the real and personal estate of A. And it was held that it did subsist, and bound both the real and personal estate.

And the construction will uniformly be the same in equity, although the instrument has become void by some matter *ex post facto*.

Thus

* Thus where A. lent B. seventy pounds, and for his security took only a warrant of attorney to confess a judgment in ejectment of three closes upon a feigned demise for twenty years. It was held, after the death of B. that this was a defective *legal* security, but that it amounted to a *good* agreement, in equity, to charge the land; and it was decreed accordingly against the heir.

[* 315.]
Dale v. Smith-
wick, 2 Vern.
151.

Again, if two persons give a joint bond, and one of them (the condition being forfeited by the day being past) pay off the money, and put the bond in suit against the other in the name of the obligee: the other obligor may, *on the act of parliament for the amendment of the law*, pleaded, that his co-obligor has paid the principal and interest on the bond before bringing the action, and this will be a discharge of the bond. But, although the bond be discharged at law, yet *equity* will, upon a bill to compel the co-obligor to make contribution, or to pay the whole, if he were liable to the whole, either direct that he shall pay the money to the other obligor, or it will at least restrain him from pleading payment by the other obligor, who is suing him at law. And the reason the court goes upon is, that * the bond is considered as an agreement in writing; and, therefore, though the obligation and penalty is gone by the legal demand being gone, yet the condition, taking it altogether, is considered, in equity, as an agreement under hand and seal to pay the money.

Vide 2 Vez.
371, 374.

4 Anne, cap. 16.

[* 316.]

So where a feme sole, seized of land and designing to marry, agreed with her intended husband, that she, upon the marriage, would convey her lands to him and his heirs; and for that purpose she, previous to the marriage, gave a bond in 2000*l.* penalty to the intended husband, conditioned, that in case the marriage took effect, she would convey her lands to him and his heirs; the marriage was had; the husband enjoyed during his life; and, on his death, his heir brought a bill in Chancery against the heir of the wife to compel him to convey the lands of the wife to the heir of the husband. It was objected that the bond became void by the intermarriage. *Sed per curiam*, The impropriety of the security, or the inaccurate wording of it, is not material; for it is sufficient that the bond is a *written evidence* of the agreement of the parties, that the husband, in consideration of marriage, should have the land as her portion.

Cannell v. Fuc-
kle, 2 P. Will.
243.

[* 317.]

Watkins v.
Watkins,
2 Atk. 97.

* So where a woman, having a considerable fortune, upon her marriage trusted her intended husband to draw up a bond to secure 1700*l.* for her, in case she should survive him; Lord *Hardwicke* said, that the court in a case of this sort would interpose, and make the agreement according to the intention of the parties; and though the bond might be void in law, yet that court would establish it in favor of the woman. And, for that purpose, his lordship declared the bond to be an imposition, and directed her personal estate to be placed out on security, the interest to be appropriated during the joint lives of the husband and wife as in the decree mentioned; and, in case the husband died in the life-time of the wife, then the 1700*l.* to be paid to the wife as agreed upon in the bond.

L. Raym. 683.
3 Keb. 304.
2 Vern. 540,
594. 3 Chan.
Rep. 40. Chan.
Ca. 232. 2 P.
Will. 608.

So an assignment of a chose in action, as a *bond*, or *the like*, which in law is not assignable, is valid *in equity* whether it be entered into with or without consideration. For a court of equity proceeds upon the principle, that the assignment, although not effectual as such at law, the bond not being assignable in point of interest, amounts, nevertheless, to a covenant or agreement, that the assignee shall * receive the money to his own use; which covenant or agreement, that court will carry into specific execution.

[* 318.]

Vide 1 Vez.
445. 450.
3 P. Will. 188.

Upon the same principle it is held, that, although an award or submission to arbitration is distinguishable from an agreement, inasmuch as the former cannot be supplied by interposition and act of a court of equity; because, generally in those cases, the time is conditional, namely, so as a determination be made by such a day, and also, therein, matters are left to the judgment of the arbitrators; yet an acceptance of any thing under it, is evidence, in equity, of an agreement to perform it.

Hall v. Hardy,
3 P. Will. 187.
Et vide 1 Vez.
539.

Thus where one accepted part of money, awarded on a bond to stand to the award of arbitrators touching a matter in dispute, he was considered as having undertaken to perform the award; he having thereby consented to it, and made it his own agreement for a valuable consideration, namely, the money paid him. And upon this ground a specific execution of the award was decreed; although his honor said that there was, unless in very particular circumstances, no instance of
a bill

AS CONSIDERED IN EQUITY.

a bill * having been brought for a performance of an award.

[* 319:]

So where A. and B. had submitted to an arbitration by bond, and an award was made (not binding by form of law) by which A. was to pay B. 900/. and to seal a release to him, and B. was to assign several securities he had from A. and A. sold some lands to raise the 900/. expecting that B. would receive it, as he had given him intimation he would, and tendered him the 900/. and a release executed: the court, though there was no other execution of the award on A.'s part, and though it was extrajudicial and not good in strictness of law, decreed that it should be performed in specie.

Norton v. Mas-
call, 2 Vern. 24.

Secondly, Having shewn what amounts to an agreement in equity, I shall now proceed to point out how an agreement may be made out in equity.

An agreement may be made out in equity, First, By proof of a positive agreement in terms: as by the production of an agreement in writing to do, or omit doing, a * particular thing; or, by evidence of a parol agreement of the same nature in part performed.

[* 320.]

Secondly, by proving circumstances, from the nature of which equity will infer an agreement.

The cases preceding, namely, those that shew what amounts to an agreement in equity, nearly demonstrate the principles which courts of equity have adopted as to proof of the circumstances from whence they infer such agreements; for there is little, except verbal difference, between the proof of an agreement, and the circumstances which render it an agreement; for, the circumstances which prove it such, constitute it to be so. But this head of our enquiry may be further illustrated by the following cases.

If a man grant a rent-charge out of a bishop's lease, and convey it by way of demise and re-demise, so that the lease is re-demised subject to the rent-charge; a court of equity will, if the grantor agree for the renewal of the lease, compel the grantee to join the grantor, the latter undertaking to convey to the

Glib. Chan. ;
244-

Y

grantee

[* 321.]

grantee * the additional lives in the same manner as before for the security of the rent charge. And it was the opinion of the court, likewise (in the case alluded to by *Baron Gilbert*, that the grantee might have compelled the grantor to have renewed, if there had been a failure of lives or fluxion of time; because the grantee of the annuity might have had a writ of annuity, and thereby have continued the payment during his life, if he had not resorted to the lands: and, therefore, when he did resort to the lands, he should have all remedy that could be obtained to make them a security to him during his life in all events; the circumstances of the contract warranting a conclusion, that such was the intent of the contracting parties.

But it seems doubtful, whether the court would have compelled the grantor to renew, if the bishop had refused on the common terms; for if the bishop had refused to renew on the common terms, it would have been tantamount to an absolute refusal, and the grantee must have been contented with the security of the lives in being.

[* 322.]
Palker v.
Sergeant, et al.
Finch 146.

Again, where A. upon a treaty of marriage * between B. his nephew and C. made proposals in writing to C.'s father, by which A. promised and agreed; that if the marriage took effect, and 2500*l.* were paid, or secured to be paid, for her portion, he would settle 200*l.* *per annum* out of certain tythes and lands for a present maintenance for B. and C. and for her jointure, if she survived; and that he would settle an estate in fee of all other his messuages and lands, being of the value of 700*l.* yearly, and also assign over and settle 2000*l.* part of the 2500*l.* upon his nephew for his further maintenance after A.'s death; this marriage did not take effect. Afterwards there was another treaty of marriage between B. and S. and A. being acquainted therewith, he, to induce this marriage, sent the before-mentioned proposals in writing to be communicated to the executors of S.'s mother; and by another writing under his hand, which he transmitted therewith, promised and agreed that, if the marriage took effect, he would make a settlement according to the former proposals, with this addition, that altho' formerly he had demanded 1500*l.* to be paid down, and security for the remaining 1000*l.* he would then be contented to stay for the whole, so that it was secured to be paid in some convenient

convenient time * agreed upon. No answer was returned to these proposals; but B. was admitted, and the marriage took place. Afterwards A. died. And, on a bill exhibited against his representatives by B. for a specific performance, it was adjudged by the lord keeper, that, when A. sent proposals, and desired to have his nephew admitted a suitor to S. although no answer was returned to A. yet the acceptance of the proposals by the friends of S. and the admission of B. as a suitor, upon which the marriage did ensue, amounted in equity to an agreement executed, and ought to be performed on all sides.

Thirdly, An agreement may be made out in equity, by proving an instrument, from the nature of which equity will infer an agreement.

Thus where A. seized of a copyhold estate, and intending that his sister, who was his heir at law, should not have his land, but that her son should have it, resolved to surrender it to the use of his will, and devise it to him: but a surrender not being practicable by reason of some accident, he prevailed on his sister to give a bond to him, that she * would, at any time, upon the payment of 200*l.* and upon the request of her son, surrender the estate to him; and then A. died. On a bill filed against the representatives of his sister, praying a decree for a surrender pursuant to the condition of the bond, it was so decreed by Lord *Parker*, chancellor; his lordship saying, it was plain from the nature of the transaction, that it was the fixed intention of A. that, one way or other, his nephew should have the lands. Not being able to surrender them, he had recourse to this bond, as the best method to secure them to him; so that this bond was not to be considered as something given in lieu of the land, but as another medium of securing the land to him. And, on the part of the mother, it amounted plainly to an agreement that the son should have the land.

And where there are plain footsteps of a further agreement, which must have been entered into concomitant with a power to sell a real estate, but which is not forthcoming, although, without inferring it, the instruments that are produced are unintelligible, and the language of them absurd; a court of equity, to uphold the intention and meaning of the parties

[* 323.]

Parks v. Wills
son, 10 Mod.
515. 2 Eq. 221
Abr. 22. Pl. 25
Et vide 1 Eq.
Ca. Abr. 18, 8.
Ibid. 393, 5.

[* 324.]
9 Mod. 62.

OF CONTRACTS OR AGREEMENTS

[* 325.] * parties in the matter of a trust, will support what is wanted by intendment, and will presume that, among the contents of the agreement of which such strong traces are found, there were those stipulations which are absolutely necessary to give effect to the true and evident meaning of the parties. *Ex gratia.* A court of equity, from provisions in a subsequent instrument, which plainly evinced that the money arising by sale of land was to be invested in the purchase of other lands to be settled to trusts, similar to those to which the lands sold were limited, inferred an *intermediate* agreement or article, for laying out the money, arising from the sale, in that manner.

Vide Newton
v. Newton, et
al. 7 Brown's
Par. Ca. 21.

And a court of equity will, from a subsequent transaction, raise an agreement *accessory* to a *precedent* transaction, where the circumstances warrant such an inference, and it is necessary, in order to do justice between parties.

Attor. Gen. v.
Whorwood,
1 Vez. 534.

[* 326.]

Thus where A. being, on his marriage with a daughter of B., to receive a large portion with her, agreed that it should be settled for her benefit for life, and, if there were no * children, then on himself. Afterwards, on the death of a sister, an accession of fortune came to B. to arise by sale of her father's estate, which was vested in trustees, who were to raise certain sums of money out of the estate, and afterwards to divide the residue among his three daughters. The wife of A. joined in levying a fine for sale of this estate. D. a trustee in the marriage articles, and who had married the third daughter, acted in the sale, and received the whole purchase money. A. gave a receipt to D. for his part of the purchase money paid for the estate, *which he thereby promised and agreed to lay out pursuant to the trust reposed in D.* Then A. died, having devised his real and personal estate away from his wife. And one question, upon a cross bill filed by her, was, whether her share of the lands, which came to her on the death of her sister, as well as the lands and tenements, purchased with the share she was entitled to out of her father's estate (which was agreed by the articles to be settled) should be bound by the marriage articles. And on behalf of the husband it was argued, that she was not entitled to have the benefit of the estate arising from her sister's death, by its being settled pur-
suant

suant to the articles ; * because it was not within the articles, and there was not sufficient proof of any such agreement extending to that estate, as would bind those standing in the place of the husband ; that the wife had levied a fine before it came into the hands of the trustee, and then the money, coming in lieu of the estate, was absolutely the husband's, and the court would not have suffered the person, into whose hands it came, to have retained it, and said, that a settlement should be made on the wife. But Lord *Hardwicke* was of opinion, that the note was sufficient to bind the testator, his representatives and the claimants under his will, to a performance of what was there agreed to ; for a man might, as between himself and his wife, make an agreement or declaration of trust in his life-time, which, though not for valuable consideration, should take effect against his executors and administrators, or those claiming voluntarily and in representation under him after his death. Then, as to the construction and extent of the note, *his lordship* thought that it was a reasonable act for him to do, and he said, that it had been truly insisted, on behalf of the wife, that on the husband's application for the money, the court would undoubtedly have ordered a * further settlement. If, then, the parties did not come into court, but acted among themselves, and the husband had agreed to do that, which the court would have directed, had the wife insisted on it in a proper suit, it should have its full effect. Though it did not appear in the cause, that the wife had levied a fine before this money came into the hands of the trustee, as it had been said ; yet, if she had done so, that must have been to satisfy the purchaser, as she was married : his lordship would not divide one act from the other, but would take all as one transaction ; and, he said, *that this note, tho' subsequent, was an evidence of what was the agreement and intent*, viz. that this money should be laid out in the purchase of land to be settled to the same uses. The circumstance warranted that construction. The trustee in the marriage articles being the proper person to intervene and receive the money arising by sale of that other share, and to see the articles performed for her benefit, he had received the whole. The husband coming to receive it out of his hands, had received it on such a promise, which was an evidence of the terms on which the money was paid to him, and of the agree-

[* 327.]

[* 328.]

ment

[* 329.]

ment and *intent on which the wife joined in the fine for sale of this estate. It was reasonable, and what the court would have obliged him to, had he come before it ; *for that was the distinction*. If a husband could lay hold of the wife's estate without aid of a court of equity, the court would not compel him to settle it, as they would where he could not come at it without such aid, which was the present case. The sum was particularly ascertained, and included both shares, as well that which arose on her sister's share, as her original share. And the promise was to lay out the whole of that sum, which therefore his lordship was of opinion must be laid out pursuant to the trust.

OF THE CONSIDERATION NECESSARY TO SUPPORT A CONTRACT OR AGREEMENT.

A *Consideration is the material cause of a contract or agreement ; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties.*

We have seen that there are two ways of making contracts or agreements. The one by parol, and the other by writing. Now, since words are frequently spoken by men unadvisedly and without due deliberation, the law will not bind a man to an executory contract entered into by words only, if it be not founded on a good or valuable consideration. And, therefore, if one man promise or covenant by parol to give another man 20*l.* to make his (the latter's) house *de novo* ; or towards his losses by fire, or the like ; here the latter shall not have an action against the former for the 20*l.*

* So if one buy of me an house, or other thing for money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered ; here no action lies for the money, or the thing sold. but the owner may sell it to another if he will : for such promises or contracts are deemed *nuda pacta*, there being no consideration or cause for them, but the covenants themselves, which will not yield an action : and this agrees with the definition of *nudum pactum*, as given by the civilians, namely, *nudum pactum est ubi nulla subest causa præter conventionem*.

Therefore, where a carpenter, by parol without writing, undertook to build a new house, and for the not doing it, the party brought an action of covenant against the carpenter, and it did not appear that he was to have any thing for building the house ; it was adjudged, that he should take nothing by his writ.

So if a man by word of mouth, or by writing sealed and *not delivered*, sell me his horse, or any other thing, and I give him or promise him nothing for it ; the contract is void, and the property in the thing sold is not altered thereby.

[* 331.]

11 H. 4. 32.
Plowd. 302,
309.

Dyer 30 b. 336.
b. Fitz. debt.
126. 17 E. 4. 4.

11 H. 4. 23. a.
Bro. act sur le
case 40. 3 H.
6. 36. L.
Raym. 909.

But

[* 332.] * But it is otherwise if contracts or agreements be by deed under seal and delivered, because there is then more time for deliberation ; for when a man passes a thing by deed so constituted, there is first the determination of the will to do it, which is one part of deliberation ; then the party causes it to be written, which is another part of deliberation : and, lastly, he *delivers* the writing as his deed, which is the consummation of his resolution. And by the ceremony of the *delivery* of the deed from him that makes it to him to whom it is made, the former, in consideration of law, gives his assent freely and deliberately to part with the thing contained in the deed, and that it should pass from him to the other. Therefore, on account of this deliberation in the making of deeds, they are in law conclusive upon the party executing them, and bind him, without examining upon what cause or consideration they were founded. Consequently, if I by deed, bond, or covenant, bind myself to give you 20*l.* to make your hall *de novo*, here you shall have an action upon this deed, bond, or covenant, and the *cause* or *consideration* for it is not material ; for there is a sufficient consideration apparent, namely, the deliberate will of the party that made the deed.

[* 333.]
Plowd. 309.

* And the law would have been the same in the case of the carpenter before-mentioned, if the contract had been by specialty. And, therefore, it is, that where a contract or agreement is by deed, the cause or consideration is not enquirable into on an action upon it ; but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound : for every deed importing in itself a consideration, namely, the will of him who made it ; a contract or agreement, where either of them is by deed, is never considered as *nudum pactum*. Thus in an action of debt upon an obligation, the consideration upon which the party gave the bond is not, at law, enquired into, because it is sufficient to say, that it was the obligor's will to make the deed.

3 Barr. 1563.

But Mr. Justice *Wilmot*, in the case of *Pillans* and *Rose* against *Van Microp* and *Hopkins*, went so far as to give it as his opinion, that the putting a contract into writing would alone be sufficient to take it out of the rule as to *nude pacts* ; upon the ground that this single circumstance would be a guard against surprize, which was the occasion of that rule : It having been held by the best authorities, that, according to the law of nature,

tho

OF AGREEMENTS:

the want of * consideration was no radical defect in a contract, if it were entered into upon deliberation and reflection; for, in that case, it would be morally good, and only require ascertainment. And Lord *Mansfield* inclined to the same opinion. But there being other principles upon which the case in question might be determined, the court avoided this point.

[* 334.]

I shall, therefore, offer to the reader some observations thereupon.

The maxim, "*quod ex nudo pacto non oritur actio*," is derived from the civil law.

Cod. lib. 3. tit. 10. lib. 5 tit. 14. i.

The *Roman* law divided conventions or agreements among men into two kinds; namely, Promises and Contracts. A promise and a contract differed in this respect simply; the former proceeded from the promiser alone who preferred it, and did not bind until acceptance by the promisee, so that the promiser till then was, at any time, at liberty to retract. A contract was the consent of two or more persons to something to be given or done. It followed of course, that a promise *accepted* immediately became a contract; for, then, there was the assent of two persons to the thing * promised; *viz.* one to perform, and the other to receive.

[* 335.]

Contracts were again divided by the civilians into *Nominate* and *Innominate*.

Nominate contracts were so called, merely on account of their having had particular forms of actions assigned to them, from their frequency and general intelligibility. Of this description was letting, hiring, partnership, commission, &c.

Innominate contracts were such as, being more rare, and not of the same defined and certain nature, the law had not provided any express or peculiar form of action to enforce, but had left them open to such suit as was best adapted to the occasion, which was called an action in prescribed terms; and seems to have been analogous to our action on the case, as distinguished from actions of debt, detinue, *ejectione firmæ*, or the like: such actions in prescribed terms not being distinguished by any specific names, but delineated by circuitry and periphrase: as *do ut des*. I give you this that you may give me that; which was where one gave money or goods

Vide 2 Blackst. Comm. 444.

- [* 336.] * on a contract that he should be paid money or goods for them. Of this kind were all loans of money upon bond or promise of repayment; and all sales of goods in which there was either an express contract to pay so much for them, or else the law implied a contract, to pay so much as they were worth. Or *facio ut facias*, I do this for you, that you may do that for me; this was where one agreed with another to do his work for him, if he would do the work of the former in return; or to do any other positive act on both sides; or to forbear on one side in consideration of something done on the other. As that in consideration that A. the tenant would repair his house, B. the landlord would not sue him for waste. Or it might have been for mutual forbearance on both sides; as that in consideration that A. would not trade to *Lisbon*, B. would not trade to *Marseilles*. Or *facio ut des*. I do this for you that you may give me that. As where a man agreed to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value upon it. Thus where a servant hired himself to his master, for certain wages, or an agreed sum, here the servant was held * to contract to do his service, in order to earn that specific sum; otherwise if he had been hired generally, for then he was under an implied contract to perform the service for what it should be reasonably worth. Or *do ut facias*, I give you this that you may do that. As where one agrees with a servant to give him such wages upon his performing such work. These innominate contracts were all included by the civil law under the general term of *Pacla*.

Pacls were by them again divided into *pacls* with a consideration or cause; and *pacls* wanting a consideration or cause. The former included all innominate contracts where something was to be given or performed, or, *vice versa*, for a consideration or cause assigned: and for these, as we have observed, an action was given in prescribed terms; for if any one by agreement effected any thing (whether that consisted in doing something, or delivering something, or in omitting, or withholding something) *hoc animo*, that another in his turn should do something, or deliver something to him, or, *vice versa*; the Roman law did not permit him, in whose favor the thing executed was delivered, or the like, to be

be deficient in performing what * was stipulated on his part, but compelled him to performance. So that if there were a cause or consideration *facti vel traditionis*, a correspondent obligation or pact arose.

[* 338.]

But pacts which wanted a cause or consideration, by a positive law of the *Romans*, produced no action in the civil forum, unless in cases of sale, which were solemnly ratified, according to a form prescribed, when they were called "*Stipulations*," from the word "*Stipula*," a straw, in allusion to the circumstance, that in such cases a straw was given to the purchaser in sign of a real delivery. And such contracts or pacts, as were innominate in respect of their having *no particular form of action assigned to them*, and were entered into without a *cause or consideration* moving from the party to be benefited, were, in respect of those circumstances, called *Nuda Pacta*, or mere Naked Pacts.

It may further be observed, that stipulations were anciently performed at *Rome* with abundance of ceremonies; the first whereof was, that one party should interrogate, and the other answer to give his consent and oblige himself. Thus, "*Quod inter nos * convent, hoc te dare facere spondes, spondeo*." So that by the ancient *Roman* law, stipulations differed from *promises* and *pacts*, inasmuch as the former might have been made in simple and ordinary language; the latter only in prescribed and solemn language. The former might have been made by writing between persons absent; the latter by words only and between persons present.

[* 339.]

So, likewise, among the ancient *Romans*, all voluntary nominate contracts were written either by the parties themselves, or by one of the witnesses, or by a domestic secretary of one of the parties whom they called a Notary, but who was no public person as among us; and the contract, when finished, was carried to a magistrate, who gave it a public authority by receiving it *inter acta* under his jurisdiction, giving each of the parties a copy thereof under his seal.

So that it seems, in both instances, *viz.* as well in the case of voluntary contracts, as that of stipulations, in order to give effect to the transaction, it was necessary that it should be *solemnly confirmed and ratified in the presence*.

[* 340.] * *presence of proper persons according to the rules prescribed by law, or it had no validity.*

Now it seems reasonable to conjecture, that, when this maxim of the *Roman law*, "*quod ex nudo pacto non oritur actio*," was adopted and received into our system, it was accepted in its full extent; our law not recognizing any ceremonies analogous to a stipulation, which seems to have been, not the creation, but the ratification of a promise or contract in form before a magistrate.

3 Blackst.
Comm. 157.

Indeed Sir *William Blackstone* observes, that the rule "*quod ex nudo pacto non oritur actio*," does not hold in some cases, where a promise is authentically proved by written documents; and instances the cases of a voluntary bond and of a note of hand. But the former of

Et vide 1 Chan.
Rep. 157. 1 Eq.
Ca. Abr. 84. A.
Pl. 1. 2 Hard.
200.

these instances turns upon the ground, that it is an instrument under *seal* and *delivered*, which binds the parties and alters their property, though there be no consideration; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting by delivery: and the latter seems to me, so far as it applies, to be a * case of a distinct species, and not an exception out of this rule. For as long as a note of hand is confined to the parties who fabricate it, the want of consideration is a clear bar to recovering anything upon it, upon the ground that it is *nudum pactum*. And when third persons become interested in it, the reason why it is not open to the same objection is, that, after it is negotiated, its operation is governed by the same law as a bill of exchange, which is the law merchant; and that is founded upon the law of nature and nations, in which the want of a consideration is no *essential* defect in a contract, as it is in the civil law.

[* 341.]

Vide 3 & 4 Ann.
c. 9.

Vide these
cases, and the
exceptions to
them, *infra*.

If the observations, already offered, were not sufficient to shew, that putting a *nude* contract into writing *simply*, will not so far alter its nature as to supply the want of a consideration, and render it valid without that requisite; the uniform practice of the court of Chancery in refusing, unless under particular circumstances, to aid a covenant *under seal*, it merely voluntary, seems to me to furnish conviction upon the subject; for the principle upon which that court withholds its interposition in those cases is, that, on such covenants,

*covenants, nominal damages only can be obtained at law ; and therefore equity, which follows the law, will not give a more substantial relief. Then, if our law, even in cases of covenants under seal, refuses its substantial aid to the parties, either at law or in equity, claiming under a voluntary contract, though executed with all possible solemnity, accompanied with a DELIVERY, and under *seal* ; which are forms as solemn and notorious as those used in a stipulation among the *Romans*, *a fortiori*, will it refuse any assistance to enforce a voluntary contract, that wants *every* of these ceremonies, *except that of being written*. [* 342.]

Having submitted to the reader the foregoing observations upon the subject of *nude* agreements, I shall now recal his attention to that of the cause, or consideration upon which a contract may be supported.

Dr. and Student, lib. 2. cap. 24.

And it is to be observed, that such a *cause* or *consideration* may arise and be created in two ways :

First, by some act to be done by the one party, for the benefit of the other party.

* And any thing, however trifling, to be done by the plaintiff, will be a consideration sufficient whereon to ground an action. As if A. demises certain lands to B. rendering rent, and B. assigns the same to D. and after that assignment rent becomes due ; and D. in consideration that A. will shew him a deed by which it may appear that such rent is due, assumes and promises to A. forthwith to pay the same : if A. shews D. the indenture of lease, by which it appears that such rent is due, A. shall have an action upon this promise against D. the shewing the deed being a sufficient consideration.

[* 343.]

Sir Anthony Sturly v. Albany, Cro. Eliz. 67. 150. Cro. Car. 70.

So where G. brought an action of assumpsit against R. and declared that, whereas T. was in debt to G. and C. T. appointed R. and delivered to him 50*l.* to pay it to G. in part payment of his debt ; upon which G. came to R. and demanded his 50*l.* and he answered that he had occasion for it, and was not at leisure, but if he would come such a day, he would pay him ; at which day he came, and the other refused to pay him. *Per Popham et Yelverton*, here is another consideration besides the debt : the creditor is to come to the house

Dyer 272. Pl. 31. note 31.

[* 344.] * house of the defendant to fetch the money. Judgment for the plaintiff.

3 Roll Abr. 22.
Pl. 25.

Secondly, A consideration may arise or be created, by doing or permitting somewhat to be done to the prejudice or loss of one of the parties. So that it is not absolutely necessary that the consideration for a contract imports some gain to him that makes the contract; but it is sufficient that the party, in whose favor the contract is made, foregoes some advantage or benefit which otherwise he might have taken or had, or suffers some loss in consequence of placing his confidence in another's undertaking: Thus, if a carpenter promise to repair my house before a certain day, and he does not do it, by which my house falls, I may have an action on the case against him.

19 H. 6. 49.

Lane v. Mal-
lory, Hob. 4.5.
S.C. Cro. Ja.
342.

So, where A. brought an assumpsit against B. and shewed that W. B. father of B. deceased, was indebted unto A. in 200*l.* and that C. and D. were bound unto W. B. by two statutes staple in 200*l.* and that W. B. delivered those statutes unto A. that he might thereby be satisfied the debt due unto him * from W. B. and that B. pretending to be executor to his father, in consideration that A. at his instance, would deliver unto him the said statutes, promised to pay him 50*l.* at one day, and 50*l.* at another; and averred, that he delivered the statutes, and that B. paid him 40*l.* of the first 50*l.* and the rest he had not paid; and A. had judgment: the judgment on a writ of error brought, was affirmed. For, though it did not appear that B. was, but only that he pretended to be, executor, and so *could make no profit of the estate*: yet, because the statutes were delivered to A. with intent to procure him satisfaction so as he might *cancel them, or take composition* for them: and that A. at the instance of B. and in hope of his promise, did *deliver them out*, and *deprive himself of that means*, it was held a sufficient consideration.

[* 345.]

So, on an action on the case for assumpsit against S. there was an agreement between A. and B. that A. should have a lease of B. with divers covenants. At the time appointed for sealing it A. refused, on account of inserting a new covenant respecting reparations. Upon which S. standing by, took upon himself that if A. would seal, *he* would make the reparations,

Dyer 272. Pl.
31 in note, et
vide Cro. Eliz.
63.

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* tions. And it was adjudged a *good* consideration to support the action against S. although the sealing the deed was no advantage to him.

[* 346.]

So, where D. an attorney brought an action on the case against A. executor of B. and counted, that, whereas he had in *Michaelmas* term, 14 Jac. prosecuted an attachment of privilege against B. returnable in *Hilary* term, B. knowing of it, in consideration that at B.'s request D. would forbear to prosecute the said writ any further against B. he (B.) did promise to pay him 50*l.* and then avers, &c. After a verdict, it was moved in arrest of judgment, first, that it was not alleged, that the plaintiff had any just cause of action. Secondly, That this action still remained. But the court *nevertheless* gave judgment against A. for, first, Suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit. Secondly, Though this did not require a discharge of the action, yet it required a loss of the writ, and a delay of the suit, which was both benefit to the one, and a loss to the other. And the court held, that an action of debt would have lain against the defendant's testator for the 50*l.* being a sum * of money due upon a contract in which he received *quid pro quo* ; for the forbearing of a suit was as beneficial in saving, as some other things would have been in gaining.

Bidwell v.
Catten, Hob.
216. et vide
Cro. Eliz. 74,
75. 849, 882.

[* 347.]

Again ; where in an action upon the case the plaintiff declared, that whereas C. was indebted to J. S. and J. S. to the defendant ; the defendant, in consideration that the plaintiff would procure J. S. to make a letter of attorney to the defendant to sue C. promised to pay and give to the plaintiff 10*l.* It was objected, that here was not *any* consideration to induce the assumpsit ; for, that the defendant, by this letter of attorney, got nothing but his labour and travail : but the exception was not allowed of ; because, in this case, not so much the profit which redounded to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, was to be respected.

Webb's case,
4 Leon. 110.

So, if one board another's wife for a year, and, after that year is past, the husband come to the landlord and promise him that, in consideration he will board his wife for a year longer, he will then pay him for this year

3 Bull. 187.
1 Roll. Rep 381,
382. 1 Roll
Abr. 12. Pl.
19.

OF THE CONSIDERATION

[* 348.]

Vide Cecil v. Salisbury, *supra*, where infant bound, upon ground of sale being delayed.

1 Mod Ent 88.

Plowd. 5 302.

1 Roll Rep.

413. Jeremy v.

Goochman,

Cro. Eliz. 412.

1 Roll. Abr. 11.

Q. Pl. 1. 2 Built.

73. 2 Leon. 225.

year and * for that which was past before ; this is a good consideration to raise a contract by way of assumption. And the reason is, that the landlord is at prejudice by this ; for, probably he would not have sojourned the wife for the last year, if it had not been for the promise of payment of the first money.

If a consideration is *executed*, and does not go along with the contract, but is entirely past, and the contract is merely subsequent ; it is not a sufficient consideration to ground a contract upon, unless something arise between the parties that is meritorious. As if one, in consideration that I have built him a house, quitted him of a trespass, disbursed money on his account, or such like, promise me to do any other thing, or pay me so much money ; these have been held not to be considerations : because there appears nothing but the consideration *perfectly past*, without *any* thing incident thereto to continue it. This therefore is but *nudum pactum*.

Dyer 272.

[* 349.]

So, where a master promised to two men, that in consideration they *had* bailed his servant out of prison, he would save them * harmless ; it was held that this did not bind him : because he had no benefit, nor they prejudice by his promise.

2 Bull. 73.

But we must take care to distinguish *this* kind of case from those, where, although some part of the consideration appears to be past, yet it is all but one transaction. As where one, being possessed of a shop, agreed to demise it to another, paying to him 40s. by the year, and 10s. for the last quarter ; and for the perfecting thereof each gave the other 1s. And afterwards, in consideration of the premises, the lessee promised to give the lessor 30l. and assumed to pay it ; in consideration whereof, and in performance of the contract, the lessor made a lease to the lessee accordingly. It was objected, that there was no good consideration expressed to raise the promise for the 20l. the same being grounded upon a consideration that was past, perfect, and executed, and so no good consideration. *Sed per curiam*. The lease here is made *after* the promise. The agreement is in performance of *all*, not of part. It was on the lessor's part to make the lease to the defendant, and on his part to pay the rent of 40s. and the 30l. in consideration of his quiet

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* quiet enjoyment of the same, which is a *good promise*, founded upon a good and sufficient consideration.

[* 350.]

So, where the plaintiff was possessed of certain lands for a term of years, and, in consideration that he had occupied the lands and paid the rent, the defendant promised to save the plaintiff harmless : the plaintiff was disturbed, by his cattle being distrained. Now, though the occupation and rent was said to be past, yet, as the plaintiff continued in possession, and was still to pay rent, that preserved the consideration, and it was held good.

Pearle v. Unger, Cro. Eliz. 94.

So a contract made subsequent by one, in consideration of another marrying his daughter or cousin, which is as a gift in frank marriage, is good.

Cro. Car. 409.
3 Salk. 96.

Again; a contract on a consideration executed is good, if there were a duty before : and, therefore, where the plaintiff declared, that such a day the defendant was indebted to him in so much, and, in consideration thereof, afterwards, to wit, such a day, the defendant promised to pay ; this is not a * consideration past, but the continuance of the debt raises a promise and an action.

Hodge v. Vawter, 1 Roll Rep. 413.
Johnson v. Aspell, 1 Leo. 198.

[* 351.]

This seems to be the principle that governed in the case of *Church and Church* ; there, in assumpsit, the plaintiff declared, that, whereas he had at his own charges buried the defendant's child, the defendant promised to pay him his charges. And judgment was given for the plaintiff, and yet the consideration was past. But by the 43d of *Elizabeth* the father was bound to bury his child.

Church v. Church,
1. Raym. 260.

So, where the plaintiff declared, that, in consideration that he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance ; here the consideration was adjudged not to be absolutely past ; for the assurance was the substance of the sale.

Warren v. Morse, Cro. Eliz. 138.

And if the thing be founded on a prior moral obligation : as a promise or contract to pay a just debt, though bound by the statute of Limitations ; this will not be *nudum pactum*.

2 Blackst.
Comm. 445.

And a consideration past will be a good ground to maintain
A a

1 Roll Abr. 114.
Cro. Eliz. 252,
422.

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[* 352.]
 2 Vent. 268.
 3 Salk. 96.
 3 Bulst. 120.
 Dyer 272. Pl.
 31. Cro. Car.
 409. * Cro. 18.
 Cro. Eliz. 42.

maintain an action upon a * *subsequent* promise or contract, where the consideration is stated to have been at the defendant's special suit and *request*; for the promise, though it follows, yet is not naked, but couples itself with the suit or request before, and the merits of the party procured by that suit or request. As for instance, though a promise to pay 10*l.* for that W. R. was bail for my servant is not good; yet a promise to pay 10*l.* for that he was bail for him at MY request is good.

Bosden v.
 Thinn, Cro. Jz.
 83.

Thus where A. requested B. to give his credit for two ton of wine, amounting to 50*l.* for one C. to D. and B. thereupon gave his bond of 100*l.* for the payment of that 50*l.* and for the non-payment thereof was sued, and enforced to pay 70*l.* and, shewing this to A. he, (A.) in consideration thereof, assumed to pay the 70*l.* unto B. such a day. It was objected, on assumpsit brought on this promise, that it was not sufficient. But the court held that, because C. upon B.'s undertaking at A.'s *request*, had credit given him by D. and that B. was damnified by reason thereof, which in conscience A. ought to satisfy, the consideration was sufficient and not passed.

[* 353.]
 Bourne v.
 Mason, et al.
 1 Vent. 6.
 Dutton v.
 Poole, Ibid.
 312.

* A mere stranger to a meritorious act done to a third person cannot thereupon found an assumpsit applicable to himself: therefore, where one in an assumpsit declared that, in consideration one A. would permit the defendants to sue another in his (A.'s) name, they promised to pay the plaintiff a sum due from A. to him, that was held no good consideration to support the action; for the plaintiff did nothing of trouble to himself or benefit to the defendant, but was a mere stranger to the consideration.

But, where a promise was made to the father, that, in consideration he would perform such a cure, the father should be paid so much and the daughter so much; there the nearness of the relation carried the benefit of the consideration to the daughter, and it was held that she might maintain an assumpsit.

Where forbearance of suit is the consideration of an assumpsit or agreement, two things must be observed: first, the forbearance must be general, or for a particular time certain, and not uncertain. And, therefore, where the declaration was, that, in consideration the plaintiff

Linghill v.
 Broughton,
 Moore Ca.
 5167.

plaintiff would abstain from prosecuting the * defendant for a debt, the defendant would pay it before such a feast ; there, inasmuch as it was to forbear, and neither mentioned whether it was a total forbearance, or for a time certain, it was held ill.

But where the consideration was for a forbearance for a reasonable time, it was held good ; and that the court ought to judge whether it was a reasonable time or not so. And, where the declaration set forth, that the defendant was indebted to the plaintiff ; and that, in consideration thereof, and that the plaintiff would not implead the defendant, the defendant promised to deliver the plaintiff fourteen quarters of barley : this was held good.

Secondly, it must be from a suit or matter in which the defendant, or the person from whom the debt or thing is said to be due, is chargeable.

Thus, upon an action on the case for a promise, setting forth that the defendant's son died indebted to the plaintiff ; and that the defendant, being his mother (but not stating that she was executrix or administratrix to him, or that she had any effects of her son's in her * hands) promised, that, if the plaintiff would forbear to sue for his debt, she would pay it : this was adjudged to be no consideration ; because she was not liable to any suit, so that the plaintiff had no prejudice by such forbearance.

But where a surety, having paid the debt of his principal who was dead, told his executor that he had paid the money, who thereupon promised to repay him, if he would forbear till such a day : it was adjudged a good consideration ; for the executor was bound in equity, though not at law, without a promise.

And idle and insignificant considerations, are looked upon as none at all ; for, whenever a person promises without a benefit arising to the promiser or loss to the promisee, it is considered as a void promise.

Thus if a man be arrested upon a void arrest, and another, in consideration of setting him at liberty, promises to pay the debt ; if the arrest be unlawful the consideration is not good.

And

[* 354.]

Lotwiche
v. Hufsey,
Cro. Eliz. 19.
Philips v,
Sackford,
Ibid. 455.

Hammere
v. Hutton,
Hard. 73.

[* 355.]

3 Saik, 96.

Randall v. Har-
vey, Godb. 358.

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[* 356.]
 Goodwin v.
 Willoughby,
 Hard. 73.

And where a lessee promised that, in * consideration the lessor would forbear to distrain his corn unshocked, he would pay his rent that was due: this was adjudged to be no consideration, because such corn was not distrainable.

Lee v. Newcomb, Hard. 73.
 Et vide 9 H. 5.
 14. Bro. tit.
 Debt 36.

So where the defendant promised that, if the plaintiff would accept the defendant for his paymaster, for a debt due to the plaintiff by a stranger, and would forbear the defendant six months, he would pay the debt: it was adjudged no consideration, because the plaintiff might sue the stranger notwithstanding, and therefore was at no prejudice.

Latch 142.
 Dyer 272. 31.
 in note.

But, it is sufficient if there be a *colour* whereon to found a suit. In such case forbearance is a good consideration. As in *Whitpool's* case, where an infant bought velvet and silk and died, and the mercer came to his wife, being his executrix, and said, that if she would not pay him he would sue her, and the wife promised in consideration of forbearance to pay him: this was held to be a good consideration, upon the ground of the colour for a suit, *she being executrix*.

[* 357.]

Where the day given is the consideration, * it need not be set forth how the debt accrued.

Woolaston v.
 Webb, Hob. 18.

Thus, where A. brought an assumpsit against B. and declared that, whereas B. did owe him 30*l.* in consideration that A. the 28th day of *August*, 1610, had given day to B. for payment of the same money until the 9th of *October* following, B. did assume to pay it him the same 9th day; upon an issue non-assumpsit, it was found for A. and it was assigned for error, that it was not shewn for what the defendant was indebted: but the judgment was affirmed; for, the debt was not in question, as if it had been an ordinary *indebitatus assumpsit*, where the debt itself is the only consideration of the promise, for there it must appear to the court; but, *here*, it was the day given, that was the express consideration. And though it were true that there must also be a debt, yet this was allowed in the promise, *being actual*, and also found by implication in the verdict.

Thorpe v.
 Thorpe, 1 Vent.
 177. 214.
 3 Salk. 95.

In executory contracts, if the agreement be that the one shall do an act, and, for the doing thereof, the other shall pay, &c. so that *the considerations are mutual*;
the

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the doing of the act * is a condition precedent to the payment, and the party who is to pay will not be compelled to part with his money, till the thing be performed for which he is to pay.

But this rule admits of these diversities.

First, If a day be appointed for the payment of the money, and the day is to happen *before the thing can be performed*, an action may be brought for the money before the thing be done; for, it appears the party relied upon his remedy, and did not intend to make the performance a condition precedent.

Secondly, Where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract; in such case performance is a condition precedent and must be averred in an action for the money: for every man's bargain ought to be performed as he intended it; and when he relies upon his remedy, it is but just, that he should be left to it according to his agreement: but, on the contrary, there is no reason that a man should be forced to trust where he never meant it. And, therefore, if two men should * agree one that the other should have his horse, the other that he would pay ten pounds for him; no action would lie for the money until the horse were delivered.

But, Thirdly, If another in consideration, that I promise to do such a thing, promise to do another thing for me, or to pay me money at such a day; *here* I need not alledge that I had performed what I had promised, but I may have an action against him for his not performing his promise to me; because the consideration and foundation of his promise to me was the promise I made to him; it is promise for promise; and that is the consideration and not the performance, and each party has a right of action against the other for non-performance. And it is a general rule, that, when the defendant has a *remedy* for the *consideration* of a promise, that consideration need not be averred to be performed: as if, in consideration that A. promises to deliver me to my use a cow, B. promises to deliver A. 50s. Here B. may bring his action without averring the delivery of the cow. So if I covenant to marry a man's daughter, and he covenants to give me a 100l. either party

[* 358.]

Ibid.

48 E. 3. 2. 3.
7 Co. 100. b.
1 Vent. 147.
1 Saund. 319.

Ibid. Jones 218.
Vide contra
Dyer 76. Pl. 30.
1 Roll 14. 415
Dyer 30. Pl.
203.

[* 359.]

1 Vent. 177.
214. Hob. 88.
1 Lev. 293.
3 Bull. 187.

5 H. 7. 10.

may

[* 360.]

Hard. 102.

may sue the other without averment of * performance on his part. Again, If it be mutually agreed between A. and B. that A. shall, before *Lady-Day* following, convey over all her estate and interest in the real estate of B. deceased to C. and her heirs ; and, in consideration thereof, C. shall, before that time, pay to A. 25/. and convey unto her and her heirs so much of the said real estate as shall amount to 50/. *per annum*, and enter into a bond of 2000/. And B. at the same time, in consideration that A. promises to perform her (A's) part of the agreement, promises to perform her (B's) part of the same. Here neither party, on bringing an assumpsit, need aver performance, on her part. For the performance is not *sub modo* or conditional, but, absolute and reciprocal by reason of the agreement ; for, it is not in consideration that A. should convey all her estate, &c. but in consideration that she agrees to do it. And the consideration upon which the action arises, is the mutual promise to perform the agreement.

Salk. 21. Hob.
88.

Mutual promises must be both binding, as well on the one side as the other ; and must be both made at the same time, or else they will be both *nuda pacta*.

[* 361.]

* A contract or agreement may be supported either by a valuable consideration : as marriage, work done, &c. or by a good consideration : as, that of blood or natural affection between near relations ; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one near relation to another.

Beard v. Nuthall, 1 Vern.
427.

The case of *Beard and Nuthall* furnishes an instance of the latter description. There B. (whose husband after marriage entered into a voluntary bond to settle a jointure of a certain value on her, and afterwards settled land of the stipulated worth, whereupon the bond was delivered up to be cancelled) her husband being dead and the evicted, filed a bill praying that she, there being no creditors, might, as administratrix of her husband, retain out of his personal estate against the defendants who claimed a share of the personal estate under the statute of Distributions, to the value of her jointure. And the court decreed that, in regard the wife was now become entitled to dower, she should proceed at law for the recovery thereof ; and that what the same should fall short in value of the jointure, should be retained by her out of the personal estate, notwithstanding

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*notwithstanding her bond was after marriage, and voluntary, and delivered up to be cancelled ; for the delivery up of the bond could no way bind her interest.

[* 362.

Various other considerations may be made the foundation of a contract or agreement, according to the respective objects those who contract have in view : therefore if an agreement be made to save the honor and reputation of a family, a court of equity, willing to lay hold of any just ground to uphold it, will consider the establishment of the peace of a family as a good consideration.

1 Atk. 3.

Thus in the case of *Stapilton* against *Stapilton*, the point in which, material to our present purpose, arose on an agreement entered into by a father and his sons (he having two, the eldest of whom was by the same mother, but illegitimate, being born out of wedlock ; but that fact at the time of the agreement unknown to the sons or to any other person, the father and mother having long lived together as husband and wife, and being actually so when it was entered into) the consideration whereof was stated to have been for settling * and perpetuating all the manors, &c. in the name and blood of the *Stapiltons* ; for making provision for his two sons, &c. and for preventing disputes and controversies that might possibly arise between them, or any other persons claiming an interest in all or any of the estates therein-mentioned ; for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5*s*. It was held by Lord *Hardwicke*, in a dispute between the eldest and the youngest son, that the circumstances recited in the agreement were a proper consideration for it, and he decreed a specific execution of it against the legitimate son.

[* 363.]

So where a covenant for settling lands, entered into by the uncle in favor of his nephew, who had disobliged his father by marriage, was recited to have been made with an intent to reconcile the nephew and his father, and for natural affection : this was held to be a good consideration for the agreement.

Winman v. Roper, 1 Chan. Rep. 84.

And, in the case of *Cann* versus *Cann*, Lord *Macclesfield*,

Cann v. Cann, cited 1 Atk. 10.

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[* 364.]
 Et supra, et
 vide, Gilmore
 v. Battison, 1
 Vern., 4 S. C.
 2 Vent. 353.
 Et vide, 2 Vez.
 284.

field, we have seen, was of * opinion, that the com-
 promise of a doubtful right was a sufficient considera-
 tion for, and foundation of an agreement.

And the common law, in some cases, considers the
 entrusting a thing with another, and his undertaking
 respecting it, as a consideration in itself for his faithful
 discharge of the trust; and, therefore, though an ac-
 tion will not lie for not doing a thing, where there is
 no consideration to uphold a contract to do it; yet,
 where there is a delivery of goods and chattels to a per-
 son, who undertakes to carry them, or do something
 about them *gratis*, without any reward for such his
 work and carriage, an action will lie on this bailment,
 if there be a neglect in the management by which the
 goods are spoiled. The obligation in this case arises
ex mandato, and is called in *Bracton*, *Mandatum Vin-*
nius, in his commentary on *Justinian*, defines *manda-*
tum to be *contractus quo aliquid gratuito gerendum com-*
mittitur et accipitur. This undertaking, we have seen,
 obliges the undertaker to a diligent management.
Bracton says, *contrahitur etiam obligation non solum*
scripto et verbis, sed et consensu, sicut in contractibus bo-
*næ fidei; ut in *emptionibus, venditionibus, locationi-*
bus, conductionibus, societatibus, et mandatis.

Bracton, lib. 3.
 100.
 Vid. *Supra*. 254
 Lib. 3. tit. 27.
 684.

[* 365.]

Vide 19 H. 4. 33.
 Bro. tit. ac sur
 le ca. 24. 48 E.
 3. 6.

This distinction is clearly taken in 11 H. 4. 33.
 where an action was brought against a carpenter for
 that he had undertaken to build the plaintiff a house
 within such a time, and had not done it; and it was
 adjudged the action would not lie, there being no con-
 sideration. But there the question is put to the court;
 what if he had built the house unskilfully? and it was
 agreed, that in such case the action would have lain.

So on an action on the case declaring that, whereas
 L. (being obliged to J. S. in 40*l.* for the payment of
 20*l.* and the bond being forfeited) delivered 10*l.* to M.
 to the intent that he should pay it to J. S. in part of
 payment without delay; in consideration whereof M.
 assumed, &c. It was assigned for breach that M. had
 not paid the money, whereupon J. S. had sued L. for
 the debt, and on non-assumpsit pleaded, there was a
 verdict for the plaintiff. And it was moved in arrest
 of judgment, that here was not any consideration;
 because

Wheatly v.
 Lowe, Cro.
 Ja, 667.

AS CONSIDERED IN EQUITY.

because it was not *alleged that he delivered it to M. at his request; and the acceptance of it to deliver to another without delay, could not be any benefit to M. to charge him with this promise. *Sed non allocatur*; for being that he accepted this money to deliver it, it was a good consideration to charge him. And judgment for the plaintiff, which was affirmed on writ of error.

[* 366.]

This point was finally settled by *Holt* and all the Judges in the celebrated case of *Coggs* and *Barnard*; which arose upon an action upon the case, wherein the plaintiff declared, that, whereas the defendant assumed safely and securely to take up several hogheads of brandy then in a certain cellar in D. and safely and securely to lay them down again in a certain other cellar in W. the said defendant; and his servants and agents so negligently and improvidently put them down again into the said other cellar, that, for want of care in the defendant, his servants and agents; one of the casks was staved; and a great quantity of brandy was spilt; a motion was made in arrest of judgment, because it was not alleged, in the declaration, that the defendant was a common porter; nor averred that he had any thing for his pains. And as to the objection, that there *was no consideration to ground the promise upon, and that the undertaking was *nudum pactum*, *Holt*, Chief Justice, and the rest of the court answered, that the owner's trusting the bailee with the goods, was a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from one place to another such a day, the defendant had not been bound to carry them; but this was a different case; for assumpsit did not only signify a future agreement, but in such a case as this, it signified an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust by reason of gross neglect, an action will lie against him for that, though nobody could have compelled him to do the thing.

Coggs v. Barnard, L. Raym. 909. S. C. Comyns 133. Salk. 26. 3 Salk. 11.

[* 367.]

It is held upon the same principles, that, if I promise another to keep him certain goods safely to such a time, and, after I refuse to take them, there lies no action against me for it. But if I take them, and they be afterwards lost or impaired *through my negligent keeping*, there an action lies.

Dr. and Stud. Dial 2. cap. 24. fol. 212. 29 Aff. 28. Owen 141.

[* 358.]

2 Vez. 450.

Supra.

* It is not necessary that, in contracts or agreements, the consideration should be expressed ; it being sufficient if it can be collected out of them from circumstances ; and, therefore, although, in Lord *Baltimore's* case, which arose on an agreement concerning the boundaries of two provinces in *America*, nothing valuable was given on the face of the articles as a consideration ; yet, Lord *Hardwicke* held, that the settling boundaries, and peace and quiet, was a mutual consideration on both sides ; and would, in all cases, make a consideration to support a suit in the court of Chancery for performance of an agreement for the settling them.

Vide 1 Leon.
170. Moore
504, 570.
Cro. J. 819.
Pl. 14. Dyer
91. b. in note.

And it is said that, if a man bargain and sell his land by deed indented and inrolled without expressing any consideration, the bargainee in pleading will not be obliged to aver payment of money, because it is necessarily implied ; and a distinction is there taken between cases where any other consideration than money, and where no consideration whatever is expressed. *Sed quære.*

[* 369.]

Vide Bedell's
case, 7 Rep. 40.

But, if an express consideration appear upon * the face of a contract or agreement, the better opinion seems to be, that, if it be insufficient to support the contract, no other can be implied.

Edwards v.
Lady Warwick,
2 P. Will. 176.

And Lord *Macclesfield*, in the case of *Edwards* and *Lady Warwick*, said, that he took it to be clear, that if one voluntarily, and without consideration, covenanted to lay out money in a purchase of land to be settled on him and his heirs : a court of equity would compel the execution of such a contract, though merely voluntary : because in all cases, where it is a measuring cast between an executor and an heir at law, the latter, in equity, will have the preference.

Quære, If the intent in favor of the heir be not a sufficient consideration to support the covenant ?

OF THE INTERPRETATION OF CONTRACTS OR AGREEMENTS, &c.

CONSTRUCTION is the drawing an inference, by the aid of reason, as to the intent of an instrument from given circumstances upon principles, deduced from men's general motives, conduct, and actions.

It has been already observed, that in all contracts and agreements, the parties stipulating must respectively assent to that which is concluded upon between them, and that such consent must be made evident to third persons by certain signs, expressing the intentions of the parties and heads of the contract. And since these signs may sometimes be taken in different senses, it is necessary there should be some rule to find out that which is true and genuine. If, then, we reflect upon the object for which contracts and agreements are entered into, we shall find, that it is to raise an obligation concerning that which is *intended* to be accomplished, * when the parties engage in such contract or agreement; for that a contract or agreement, in whatever terms it may be expressed, cannot be carried beyond the intent of the parties at the time of entering into it, is clear from the nature of its constitution; one essential ingredient being, "that it is entered into freely, of the parties' own accord."

[* 371.]

Therefore if a man grant by his deed, that if J. S. be not yearly paid the sum of 10s. then he may distrain for it in his manor of *Dale*; this is, by inference of law, a good rent charge *out of* the manor: because he has given the grantee a power to distrain, if such a yearly sum be not paid him, and the manor being thereby charged with the distress, is, consequently, charged with the rent for which the distress is given. But no writ of annuity lies for it, because there is no grant of the rent by the grantor.

Co. Litt. 146.
147.

So, if a rent be granted to A. with a clause in the grant that if the rent be behind, a stranger shall distrain for it for the use of the grantee; this, in construction of law, is a good rent-charge in A. and a distress, limited to a stranger for his benefit, is, in effect,

2 Roll Abr. 425.

[* 372.]

effect, making the stranger the grantee's servant for this purpose; and what a man may do by one servant he may do by himself or any other.

1559

Salk. 154. Pl. 2.

Vide: Vern.

341. Pic. Chan.

§ 53.

The court of Chancery proceeds upon the same principle, when it holds, that if a term be raised for a particular purpose, in pursuance of marriage articles, it shall, when that purpose is answered, fall again into the inheritance, and shall not be assets to pay any debts, but what affect the inheritance as bond debts and debts of a superior nature, and not simple contract debts.

But a contract shall be carried in equity to the full extent intended, if, by any construction, the words can be made to effect it.

Thus, if there be a trust to raise money out of the profits of an estate, it implies in equity, a sale, if the sum cannot be raised conveniently within the time limited; for the intent is, that the money shall be raised.

[* 373.]

The intent of the parties to a contract or agreement, is to be gathered from external signs and actions; for whatever difference * there may be between a man's internal sentiments and external expression, he must, in his ordinary transactions with mankind, be concluded to use signs according to their common acceptance: for there could be no such thing as an obligation, if a man might affix what interpretation he pleased to his signs, and pretend that he meant to use them different from their received signification. Therefore, he, in whose favor an obligation is incurred, has a right to compel him, from whom it is due, to perform it in that sense, which the ordinary interpretation of the signs made use of import.

The signs of the intentions of men are of two sorts; namely, Words and Actions.

Flowd. 169.

As to positive words. The rule seems to be, that, unless there be the most decisive reasons which lead us to conjecture the intent was otherwise, they are to be understood in their proper and most known signification. Not the grammatical one, which regards the etymology and original of them, but that which is vulgar and most in use; for use is the judge, the law, and the rule of speech.

Thus

* Thus if a man agree with B. for twenty barrels of ale, he shall not have the barrels after the ale is spent. So if one covenant with another, that if that other come to his house he will give him a cup of wine, the covenantee shall have the wine, but not the cup. But if the bargain were for firkins of wine, or for a hoghead of wine, then the vendee shall have the firkins or the hoghead.

[* 374.]

Plowd. 86. Bro.
Contract 4.
27 H. 8. 27 b.

So words used in the present tense shall be taken for the future, where according to their ordinary import they are so meant: as if a man lease a house for years, upon condition that if his wife, *being a widow*, will inhabit it, the term shall cease; this shall be taken after his death for a future time.

27 H. 8. 19.

So the words *dedi et concessi*, in a deed of feoffment, shall be taken for the present time, and yet they are in the praeterit tense.

35 H. 6. 11 b.
15 17 a.

A lawful age in general words (unless it be in a particular case, as of a guardian in soccage) shall be construed and taken to mean twenty-one years.

1 Chan. Rep.
53. 54.

And where a lease was made for *octoginta et terdecem annos*, the question being, whether *terdecem annos* should signify thirty, or thirteen years it was contended, that it should be expounded for thirty years, because it should be taken most strong against the lessor: but the court held unanimously, that it should be taken according to the common *parlance*, for thirteen years; for *terdecem* and *tres-decem*, were all one, and so writ *euphonia gratia*; and it being one entire word, it could not be otherwise taken.

[* 375.]

Hopehill v.
Searle, Cro.
Car. 386.

So a lease for twelve months, is only forty-eight weeks; because a month, in law, is a lunar month, or twenty-eight days, unless otherwise expressed. But if a lease be for a twelve-month, in the singular number, it is good for the whole year; it being generally understood, that by the space of time so called, in the singular number, *viz* "a twelvemonth," the whole year is meant.

2 Black. Com.
141. 6 Rep. 61.

Again; if a man grant one hundred acres in such a field, and sixty in such a field, and twenty acres of meadow in such a meadow, in which fields or meadows the acres are known by estimation; the acres shall be taken as they are *so known*, be they more or less than

Foph. 55.

[* 376.]

* than statute ; for they pass as they are known, and not according to the measure of the statute. But if I have a *close*, containing by estimation in the aggregate twenty acres, and which, by the statute, is not eighteen acres, and I grant ten of these acres, the grantee shall have them according to the measure of the statute; because the *acres* of such a close are not known, by the estimation by *parcels*, or by *metes* and *bounds*, though the close be estimated in the aggregate.

And where words used in a contract, expressive of quantity, or the like have different significations in different places ; they will take effect as they are understood where they are spoken.

Sheph. Epit.
172.

Thus, if one sell todys, or pounds, bushels, yards, ells, or perches of any thing, they will be accounted, measured, and reckoned according to the custom of the country or place where they are, and not according to statute measure, or the custom of any other country.

[* 377.]

But, when words are equivocal, or sentences are ambiguous, and capable of several significations, conjectures are necessarily * resorted to, in order to discover the true meaning of the parties. And such conjectures may be made from three sources : the subject, the effects, and the circumstances.

First ; it is a rule, that words are to be understood according to the subject of them, which is thus expressed by the civilians : *Verba generalia restringuntur, ad habilitatem personæ, vel ad aptitudinem rei.*

14 Aff. Pl. 21.

Therefore, if a man grant to another common within the metes and bounds of the village of Dale, and part of the vill is his in severalty, and part his waste and common ; the grantee shall not have common in that which is his in severalty.

9 H. 6. 35.
Fitzh. Comm.
mon. 6. 12 H. 8.
2.

So, if I grant a man common out of all my manor, he may not, by virtue thereof, have common for any beasts but such as are commonable, nor take it in my garden or any such place, but only in commonable places. And if I grant one common for ten beasts yearly for three years, and he do not take his common the first two years, he shall not put on thirty beasts, and take all the third year. Upon the same principle, if a
man

man * grant another common for all manner of beasts without number, the grantee may not take this, with so many beasts as to leave the grantor no pasture for his cattle. [* 378.]

So, if I grant a man all my trees growing upon my lands in D. it shall not extend to apple-trees, or other fruit trees growing in my gardens and orchards, if there be any other trees upon my ground. 14 H. 8. 2.

Again, where there was a proviso in a lease of a manor, wherein were divers copyholds, "that the lessee should not molest, vex, or put out any copyholder paying his duties and services *sub pana forisfactura*, and the lessee entered upon a copyholder in a cow-house, parcel of the premises, and beat him; this was held not to be any breach of the condition: for it is to be intended of such a molestation as should be an expulsion or molestation concerning his copyhold tenement, and there is not any breach by a tort done to his person, or in disturbing him in any other lands, unless they were his copyhold tenements within the manor. Penn v. Glover, Cro. Eliz. 421.

So, if a man expressly warrant land for * years, which is but a *covenant*, he will not thereby be bound to defend against tortious entries. [* 379.]
26 H. 8. 3. 20.
H. 6. fol. 3. b.

Again, where, on an *assumpsit* that A. should enjoy such lands, according to his lease, without the let, interruption, or incumbrance of any person; it was shewn in fact, that this land was extended for debt due to the king by process out of the Exchequer, and so incumbered: after verdict, it was moved in arrest of judgment, that this was not a good breach assigned; for it was not shewn for whose debt, nor where, nor by whom it was due, and it might be that it was for the plaintiff's own debt. And it was adjudged for the defendant, for to establish a breach of the covenant, the plaintiff must shew a lawful incumbrance. Brocking v. Cham. Cro. Ja. 425, 10. et vide Foster et al. v. Mapes Cro. Eliz. 212, 213.

So, where a man was bound by covenant in law, that his lessee should enjoy his term, and the lessor gave bond for the performance of covenants; and on an action of debt brought upon the bond, the breach assigned was, that a stranger had recovered the land leased in an *ejectione firma*, and had execution: it was held that, although this eviction was by course
cf

Nokes's case,
4 Rep. 80. et
vide Hamond
v. Dod, Cro. Car.
5 et Cowper v.
Pollard, W.
Jones 197.
8 Rep. 91. b.

[* 380.] * of law, yet, as an elder and sufficient title was not alledged upon which the recovery was had, it was no breach of covenant:

And, "to give effect to the intent," the construction of a contract, as to the manner of its operation, will vary according to accidental circumstances, affecting the state of the subject contracted about after the contract entered into, and before its completion.

Co.Litt. 147.b.

Thus, if A. bargain and sell land to B. by indenture, and, before enrolment, they both join in a grant of a rent-charge to C. this, after the enrolment, will be construed the grant of B. and the confirmation of A. Because, when the bargain and sale is enrolled, it has the effect of a deed enrolled from the making thereof; and therefore it must be the grant of B. who had the land at the time of the grant made. But, if the deed never be enrolled, then it shall be construed the grant of A. and confirmation of B. because the land never passed from A. the deed being ineffectual and void without enrolment.

[* 381.]

1 Rep. 77. a.
6. Rep. 15 a Co.
Litt. 302, a. b.

So, *ut res magis valeat quam pereat*, the * construction of the same kind of contract, as to the manner of its operation, will vary in different cases, according to the manner in which it is carried into effect: *Ex gratia*. If tenant for life, and he in the remainder or reversion in fee, join in a feoffment by deed, it is held, on construction, that the livery of the freehold moved from the tenant for life, and the inheritance from him in the reversion or remainder, from each according to his estate. But if a feoffment be made by parol; then it is the surrender of the tenant for life, and the feoffment of him in remainder; for, otherwise nothing would pass by parol.

And where the same words in the same contract or agreement, are applicable to subjects of different natures, a different construction may be put upon them according to the nature of each subject, and to answer the intent.

As if a limitation of freehold and leasehold, or copyhold and leasehold, were comprised jointly in the same form of words. In such case there could be no reason why a court should not construe the limitation, although contained in articles or an agreement, differently according to its application to the one subject

OF AGREEMENTS.

* Subject or the other; as was done in the cases of *Forth* and *Chapman*, and *Glenorchy* and *Bosville*, in the construction of devises: And of this opinion was Lord *Hardwicke* in the case of *Exel* and *Wallace*.

[* 332.]
1 P. Will. 663.
Ca. T. Talbot
3.

Secondly, the effect and the consequence that will follow, from accepting words in their ordinary import; frequently leads us to a necessary conclusion, that the genuine meaning of the person using them, is different from their common acceptation; as where words, if taken according to their ordinary sense, will render a contract ineffective and frivolous. In such case we may a little deviate from their received sense to prevent this inconvenience; for *verba aliquid operari debent, et cum effectu sunt accipienda*:

2 Vez. 3256

Thus if a lease be to A. for life, rendering rent at *Michaelmas*, and after his death to his executor *until Michaelmas*; the executor, notwithstanding the word *until*, is, in its general sense, exclusive, shall have it for the whole day of *Michaelmas*; because otherwise no rent would be due.

3 Leon. 2115

So if an annuity be granted *pro consilio* * *impendendo*; or a feoffment for instructing a son, or for paying of a sum of money; these amount to a condition, without conditional words; because otherwise the party would be without remedy.

[* 383.]
Noy's Maxims,
14.

So if A. sell to B. *the * fourth part* of his manor of *Dale*, and say not in how many parts to be divided, this shall be construed four parts in five; but it shall not be intended four parts of four parts, or the whole of four quarters; because that would render the words idle and of none effect.

Bacon's Max.
47.

* Quære, Should
not this be
"four parts."

Upon the same principle, *viz. that the object intended by the parties would fail of effect, subject to any other construction*, the court of Chancery interposes to carry marriage articles into execution by way of strict settlement, notwithstanding the articles themselves are not penned in that manner: for the great and immediate object of such agreements, and consequently the principal intention of the parties is, to make such a settlement as will contain an effectual provision for the issue, which end will not be answered by a settlement that pursues the language of the agreement; because the

Vide infra.

[* 384.] effect and consequence of * such a settlement would be to leave the issue at the mercy of the ancestor, who would have power to bar them by fine or recovery.

Stokes v.
Stokes, 1 Lev.
978.

And where, in debt on an obligation, the defendant pleaded a release; and therein it was recited, "that whereas J. S. had arrested the defendant in the name of the plaintiff without his knowledge, he thereby released to the defendant all demands *on his own account*." And it appeared that the obligation was taken by J. S. in the name of the plaintiff, in trust for the children of J. S. and thereupon J. S. caused the defendant to be arrested in the name of the plaintiff, upon which the release was given; it was adjudged that the obligation was not released thereby, because, although it was taken in the name of the plaintiff, it was not on account of the plaintiff, but on account of the children of J. S. And the words "upon his own account" were put in to some purpose, and they could be for no purpose, but to distinguish the demands that he had in his own right, from what he had in the right of, or in trust for others.

[* 385.]

Thirdly, The actions or circumstances attending a transaction, may be called in aid to * explain the nature of dealings between parties, where, otherwise, an ambiguity hangs over them.

Thus if two men should bargain for wheat, without mentioning the quantity or sort, it would be an imperfect bargain. But if by their former dealings it appeared, that such a sort and such a quantity was thought of and designed, it would be as good as if it had been actually expressed.

41 E. 3. 6. 19.

So if a man grant A. B. an annuity of 10*l.* a year *pro consilio impenso et impendendo*; if A. B. be a physician, it shall be understood of his counsel in physic; and if he be a lawyer, of his counsel in law.

Bacon's Max.
71.

Again, If I let a tenement to J. S. near by my dwelling-house in a borough, provided that he shall not erect or use any shop in the same without my licence; and afterwards I licence him to erect a shop, and J. S. is then a miller; he shall not by virtue of these words erect a joiner's shop.

Cook v. Booth,
Cowper 819.

Upon this principle the court of King's Bench decided the case of Cook and Booth.

That

*That case arose upon a covenant in a lease for three lives, "that if the lessee, his heirs and assigns, should be minded at the decease of the said A. B. and C. or any of them, to surrender that lease and take a new lease of the said premises, and thereby add one new life to the then two in being in lieu of the life so dying, that then the lessor, his heirs, &c. upon request on such surrender of the lease then in being and upon payment, &c. to the lessor and his heirs, &c. for every life so to be added in lieu of the life of every of them so dying, and at the proper costs of the lessee, without demanding any further fine for the same, should and would grant and execute unto the lessee, his heirs, &c. a new lease for the *lives* of the two persons named in the former lease as should be then living, and of such other person as the lessee, his heirs, or assigns, should nominate and appoint in lieu of the person named in the preceding lease, as the same should respectively happen to die, under the before-mentioned annual rent, and the *same* covenants therein contained." There had been successive renewals of this lease, containing the same clause of renewal. At length the lessee died. And afterwards a new lease was *tendered to the heir of the lessor, who refused to execute it, because it contained a covenant for renewal on the death of D. and E. who were not any of the lives named in the original lease. And one question was, whether the heir of the lessor was bound to add any covenant for renewal after the death of the surviving nominee, or, in other words, whether this were a covenant for a perpetual renewal. And Lord *Mansfield*, *Wilkes*, and *Ashurst*, were of opinion that, there having been four or five renewals, the lessors themselves had put the construction upon the covenant: for in all of them the covenant for renewal had been uniformly repeated.

In some cases the ordinary import of words may be restrained. Vide inf.

First, where there is an original defect in the will of the speaker, so that it is not co-extensive with his words.

And, secondly, where there is some collateral accident inconsistent with the speaker's design,

Under

[* 388.]

Under the first of these distinctions, we may * comprise all cases where there is good reason to conclude, that the person who spoke was aware of certain things, and yet did not intend to include them in the general terms he used ; though he did not expressly except them, because he supposed such an exception clear in itself.

3 Mod. 278.

Thus if a man have goods of his testator's, and also other goods in his own right, and grant "*omnia bona sua* ;" the goods that he has as executor do not pass. For though they are *bona sua*, in respect of the possession that he has of them, yet they are not so strictly speaking. A man may, therefore, naturally conclude, that when he is using words applicable to things which he has in his own right, he must be taken as meaning to except out of them things which he has as executor, although his terms being general, might, in some sense, be applicable to them.

Dobson
v. Crew,
Cro. Eliz. 705.

So if the condition of a bond be, that A. shall not hurt, endanger, or molest B. in his lands or goods upon *any* account : it shall be intended of a tortious molestation ; but not to restrain A. from pursuing the obligee for felony, or upon any other just cause.

[* 389.]
Co. Lit. 1cc.
535. 6. 7.

* Upon the same principle it is held, that the lord, by confirming the *estate* of his tenant, does not pass his right to the seignior, although the word "*estate*" be sufficiently operative to include it : because the confirmation or assent to the estate, in a reasonable construction of it according to the subject, cannot be interpreted to pass a distinct right in the lord separate from the estate in the tenant ; since his words take effect and have a full operation, without concluding, from his assent to one estate that he has parted with the other.

This *original defect* of the will may be discovered, either, from the circumstance that an *absurdity* would evidently follow such construction, or from a defect of matter contracted about.

The principle in the first instance is, that no man is to be supposed to intend that which is *absurd*.

Tisdale v. Es-
sex, Hob. 34.

Therefore if a man covenant that another shall have, occupy, and enjoy certain lands for seven years ; an ejectment by a stranger will be no breach of this covenant ;

nant; and one *reason is, because the law will never judge that a man will be so absurd as to covenant against the wrongful acts of strangers, except he covenant expressly to that purpose.

[* 390.]

So if the covenant be to save harmless *against all persons*, it will be understood against a lawful entry or eviction.

Cro. Eliz. 219.

But if it were to save harmless against a person certain, the covenantor ought to defend the covenantee against the entry of that person, be it by right or wrong; for the covenantee is damnified if he be disturbed, though by wrong, and the covenant shall (where it does not involve an absurdity, as would be the case were a man to covenant against the unlawful acts of all the world) be taken most favorably for the covenantee.

Ibid.

The principle in the second instance is, that the matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense: and, therefore, the generality of the words used, shall be restrained by the particular occasion.

Thus where A. had a judgment of 6000*l.* * against B.—B. gave A. a legacy of 5*l.* and died. A. on receipt of this 5*l.* gave the executor of B. a release in this manner: I acknowledge to have received of C. 5*l.* left me as a legacy by B. and do release to him *all demands* which I, against him *as executor of B.* can have, for any matter whatsoever: it was adjudged, that the generality of the words, *all demands*, should be restrained by the particular occasion mentioned in the former part thereof, *viz.* the receipt of the 5*l.* legacy, and should not be a discharge of the judgment.

[* 391.]
Knigh. v. Cole,
cited 1 Bq. Ca.
Abr 170. Pl. 4.
note a. 1 Lev.
121.

So if a man by indenture let a house for years, and the lessee covenant to repair it well from time to time during the term; and at the end of the term to leave the same well repaired to the lessor; and a breach be assigned, for that he did not leave it well repaired at the end of the term. And the lessee plead that the lessor, within three days after the date of the indenture, released all debts, duties, and demands; and the truth be that the lessor had recovered six pounds damages and costs against the lessee, and made an acquittance upon the receipt thereof, with a general release of all actions, duties, and demands. This release will not be

Hancock v.
Field, Cro.
Jam. 170 11.
Et vide Henn
v. Hanton,
infra.

[* 392.]

Henn v. Han-
son, 1 Lev. 99.
8 C.1 Sed. 141.
Et vide Cro.
Eliz. 6c6.

Vide 8 Rep.
153 b Co.
Litt. 291. b.

Hetley 15.

be any bar, although it be * "of all demands," which is the most general word in releases.

So if there be a covenant in a lease for years to pay rent reserved ; and, after the release made, the lessee, in performance of an award of all matters in controversy between the lessor and the lessee, give a release of all demands at a day before any rent is due ; this will not release the rent : and yet the rent, although not then due, is a cause of demand ; and by a release, of all demands, not only all demands, but also all causes of demands are released. And the chief reason is, on the intent of the parties : because the release, being made upon an award, is intended only to release things then awarded, and not a growing rent. And a release, and the general words in it, shall be restrained and bound to the intent of the parties.

So where, on a writ of annuity, a release was pleaded by which the plaintiff acquitted the defendant of one payment for half a year, and released to him all actions, suits, and demands ; it was adjudged that the release does not bar him out of the arrearages of half a year.

[* 393.]

* Upon the same principle, if an estate be given to a man and his heirs male, his grandsons by his daughter are not supposed to be meant by it ; for, from the nature of such a settlement, males are plainly meant to be *alone* included.

Dafforne v.
Goodman,
2 Vern. 362.
Et vide Salk.
154. Pl. 2.

So where one possessed of a term for years, on his marriage, assigned it to trustees in trust for himself for life, remainder as to a moiety to his wife for life, remainder as to one moiety to the heirs of the body of the wife by him begotten, remainder as to the other moiety to the children of the body of the wife. It was held that, this being the estate of the husband, and the settlement to the purposes before mentioned being made upon his marriage, the declaration of trust for the benefit of the children of the wife, must be intended the children of *that* marriage, and not her children by any other husband.

Secondly, an original defect of the will may be discovered, where there is some collateral accident falls out inconsistent with the speaker's design : as in a case where something happens that could not be foreseen, but is such as, if it had come into the mind of him

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* him who spoke, he would have excepted it : as in the case put in *Cicero* of him who falsely believing his own son to be dead had made another his heir.

Fortescue held, in a similar case put by him, namely, that if *cessui que use* had issue a daughter, and, being sick, declared his intent to his feoffee, that his daughter should have his land after his decease, and he had afterwards recovered his health and had issue a son ; that it was good conscience that the son should have the subpœna, for he was his heir. The reason was, that the father's intent proceeded upon the supposition that he should have no son, which proving false, there was no intent in favor of the daughter.

And the principle would be equally applicable in case of a contract so circumstanced.

Thus where A. gave bond to pay 900*l.* to his daughter in case he should have no son living at the time of his decease, and he died his wife enfeint with a son. On a question whether the daughter should have this 900*l.* which if she had, it would have been more than his son would have had. *Per curiam*, *She shall not have it: for although there was no son living at his decease, so that it was recoverable at law, yet it could not be presumed to be the father's intent, that, if a son were born after his decease, the daughter should run away with the estate. And upon this ground the son was relieved in equity.

But if there be in the terms of a contract any obscurity or dubiousness, which cannot be cleared up by the intention of the contracting parties or any other circumstance and all other rules of exposition of words fail, then the construction ought to be against him who ought to have explained himself or made the other have delivered himself fully. And, therefore, he who is obliged ought to speak clearly, or otherwise, in general, the other party has a right to explain the clause for his own advantage. Therefore if two tenants in common grant a rent of ten shillings, this is several and the grantees shall have twenty shillings ; but if they make a lease and reserve ten shillings, they shall have only ten shillings between them. So if a man, seised of twenty acres of land, grant a rent of twenty shillings, *precipiendum de qualibet acra terre sue* or out of every acre of land. This is in nature of a several grant

[* 304.]

Cicero de oratore, lib. 1. cap. 36.

Fitzherbert tit. Subpœna. 23. *Statham* confessione 1.

1 Rep. 100.

Gibson v. Gibson, 2 Freem. 223.

[* 395.]

5 Co. 7. b.
Plowd. 140.
161. 171. 283.
Co Litt. 197. 7.
267. b.

Co. Litt. 147.
Roll Abr. 223.
Kelw. 3.

[* 396.]

Digest. lib. 2.
tit. 14. De pac-
tis leg. 31.

* grant out of every acre ; for the strongest construction again the grantor is, that the grantee shall have twenty shillings out of each acre. In this rule of construction the law of *England* agrees with the *Roman* law, wherein it was a maxim that all obscurities and ambiguities in a bargain of sale, or letting, must be interpreted against the seller or landlord. *Veteribus placet, pacitionem obscuram, vel ambiguam venditori et qui locavit nocere : in quorum fuit potestate legem apertius conscribere.* In this respect the determination of the common law of *England* and the *Roman* law, are, in some instances, in opposition to the nature of things ; for if the thing contracted about be burdensome to the party whose words are to be expounded, the interpretation to be agreeable to the intent, as the latter must be presumed from the nature of things, ought to be favorable to him : for every one seeks his own advantage, and consequently engages himself to as little inconvenience as possible ; whereas, according to the construction alluded to, he is presumed to have bound himself as strictly as the words in their largest sense will effect. Therefore, perhaps we should come nearer to truth, if we were to hold, that the contracting party for whose benefit the agreement is burdensome to the other, is he who * should either explain himself, or make the other explain himself, with all the clearness necessary to prevent ambiguity or obscurity. Therefore the construction should always go against him.

[* 397.]

Indeed, in some instances, construction is, in the law of *England*, made according to the rule last-mentioned. That is, where the contract or agreement contains something in its nature odious ; of which kind are all contracts that carry a penalty with them ; or lay the charge on one party only, or on one more than one another.

Dyer 17. a.
5 Rep. 22. a.
Vide exception
5 Rep. 23. b.

Upon this principle, words or sentences used in the condition of a bond, which considered simply in their own nature, are equivocal or ambiguous, shall *generally*, in respect of the object of the condition, be taken in ease and favor of the obligor ; the reason for which seems to be, that they are inserted for his advantage, and to discharge him from a penalty.

Dyer 17. a.

Therefore if a man be bound to another upon condition to pay 10^l before the feast of *Saint Thomas*, and there

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there are two feasts of *Saint * Thomas*. The money shall be due on the last feast and not on the first, for that is most beneficial for the obligor.

[* 398.]

Upon this principle it has been determined, that where the condition of a bond consists of two parts in the disjunctive, and *both* are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part ; for he hath election to perform the one or the other for the saving the penalty of his bond ; and when one part is become impossible by the act of God, it is as beneficial to him as if that part of the disjunction, which is become impossible, had been only the condition of the bond : and therefore, when one alternative becomes impossible by the act of God, so that by no industry the obligor can perform it, the bond is saved.

5 Rep. 22.
10 Mod. 26.
W. Jones 29.
Cont. Salk. 176.

So where debt was brought on an indenture to recover 2200*l.* whereby the plaintiff covenanted with the defendant to assign to him, or any other whom he should appoint, on the 30th *January* next following, ten shares in the corporation of the linen manufacture ; and the defendant covenanted with the plaintiff to *accept them the said 30th of *January*, and at the same time to pay the plaintiff 1100*l.* A question arose out of the pleadings, whether the assignment ought to precede the payment of the money ? and it was argued that it ought ; because the covenant was in nature of a condition or defeazance to save the forfeiture of the 2200*l.* ; and, then, if the condition could have two indentments, the better for the obligor should be taken ; and, therefore, the payment of the money should refer to the acceptance of the assignment, and not to the day on which the assignment ought to have been made. So that the legal construction of the deed would be, that the plaintiff should assign and transfer the shares on the 30th of *January*, and that the defendant should accept it, *and on such acceptance the money be paid.* And of that opinion were the court.

Elwich v. Cudworth, 1 Lutw. 490.

[* 399.]

Upon the same principle it is said, if one be bound to make to a man a sure, sufficient, and lawful estate in certain lands, by the advice of J. D. ; if he make an estate to him according to the advice of J. D. be it sufficient or not, lawful or not lawful, yet is the bond saved.

7 E. 4. 13 b.
Pl. 4. Fitz. tit.
Dett. 81.

OF THE INTERPRETATION

[* 400.]
Co. Litt. 4^o.

* Another exception to the rule of accepting ambiguous words most strongly against the speakers, is, where such construction will work a wrong to others. And, therefore, if tenant in fee make a lease for life, without expressing for whose life, it shall be intended for the life of the lessee. Yet if tenant in tail grant a lease in such terms, it shall be taken for the life of the lessor; because, otherwise, it would work a wrong to the reversioner.

Bro. Exposition
des terms 39.

Subject to the above observation, words are to be understood in the most comprehensive sense in which they are generally accepted; as the masculine is to be understood as including both genders. Thus the word Men shall extend to women as well as men.

So if a licence were given to kill any beasts of chase in such a forest except Bucks; under that name Does also ought to be comprehended, for when we speak of a buck, or any other creature in the masculine gender, which is the more noble, it comprehends the female as well as the male, unless there be some circumstance which shews plainly, that we speak of the male in opposition to the female.

[* 401.]

* And an indefinite expression shall be understood universally, unless there be otherwise some reason to restrain it.

19 H. 5. 42^o
Hutley 9.

Thus if two persons have goods in jointure, and give all their goods, not only those they have in jointure, but their several goods also pass. So if two grant their rents, their several rents, as well as those which they have jointly, pass according to their several interests.

† And. 57.

Again, if one reciting that he is possessed of divers ewes, give them to me, the gift shall extend to all the ewes which he that makes it is possessed of. But if one be bound to prove that divers men were at such a place, if he prove that two were there, he has performed the condition; for he proves that two were there, in which number is contained divers.

Ibid.

So if a covenant be to make an assurance of divers lands, it shall be construed of the whole or part according to the intent.

Cooke v.
Founts,
3 Lev. 40.

Again, where one bargained and sold lands that he had purchased of W. and covenanted that he was seized
of

of a good estate in fee * according to the indenture made to him by W. In covenant it was assigned for breach, that he was not seised of a good estate in fee. The vendor pleaded that he was seised of as good an estate as W. conveyed to him; upon which there was a demurrer. And it was held good: for the covenant was absolute that he was seised of a good estate in fee, and the reference to the conveyance of W. imported only the certainty of estate, not the title. [* 402.]

If a man speak in legal language, his words shall be taken in their most comprehensive signification; so as not only to import what they do in ordinary language, but also to include whatever they signify in that sense, which the law has imposed upon them.

Thus a limitation that a man's *heirs* shall have his land, as long as he pays such annual payments; and that if *his heirs* do not pay, then A. B. shall have it, extends to *all* his heirs successively: for the grantor is supposed to know the force and extent of the terms, and, knowing them, is concluded to have used them without restriction, unless there be some probable reason to induce us to believe his mind did not go to their full extent.

Videa Roll 253.
E. 25. 25.

* And, in expounding contracts and agreements, that construction, as has been said, is made of them, which is consonant to the general intent, as it appears in the context.

[* 403.]

As if the vendor of a lease covenant and grant, that he has not made or done any former grant, or other thing by which the then present grant or assignment may be in any manner impaired, hindered, or frustrated; but that the assignee and his executors, by virtue of the said grant or assignment, may quietly have, hold, and enjoy, all and singular the premises, with their appurtenances, during the term to come, without any hindrance or disturbance by him, or *any other person*: the latter words must be taken with reference to the former words; and it is no breach, if the assignee be disturbed by *any other person*, if it be without the act of the assignor.

Broughton v.
Conway, Dyer
240. Moore 53.

Again if one covenant that lands are of the value of 1000*l. per annum*, and so shall continue, notwithstanding any act done, or to be done by him; the words "notwithstanding any act," extend as well to the time of the covenant made, as to the time future; and,

Rich v. Rich,
Cro. Eliz. 43.
Et Terris v
Peade, ibid. 615.

[* 404.]

*and, though they be not *then* of that value, the covenant will not be broken, except some act done by the covenantor be the cause of it.

Dyer 265 Pl.

4.

So, if a bond be made with condition, "that, if the lessor *suffer* the lessee from year to year during the term, quietly and peaceably to have, hold, and occupy the tenement and land aforesaid; and that without trouble, vexation, or denial of the lessor, *or any other person or persons*, that then, &c." This condition (notwithstanding the generality of the latter words) will not be broken by an entry of a stranger; because all the sequel of the condition has reference to the first word "*suffer*," which is passive: so that no act is to be done by the obligor, but only a sufferance of him, his executors and assigns, and that, notwithstanding the words, "and without trouble, &c." which only mean, that the obligee ought to enjoy the lease against all others, &c. but if any procurement or occasion of disturbance be by the obligor, his executors, or assigns, then he has forfeited the obligation; and "that" refers to the word "*suffer*."

[* 405.]

Bony v. Laylor,

2 Roll Abr. 253.

H. 3.

*So, if a man make a lease for life, the remainder to another for life, the remainder to the use of the heir or heirs of his own body, and to the use of the heir of such heir or heirs, and, if he die without issue of his body, the remainder over; in this case, his heir shall take by descent: for, although *heir* be a name of purchase, yet, the words "or heirs" explain it, and make him in by descent of an estate tail.

Crookhay v.

Woodward,

Hob. 217.

Again; where a covenant was "to satisfy within three months after request, and due proof of embezzlement by an apprentice," it was held, that the word "proof," being left at large and capable of being made in court judicially, in an action brought against the apprentice before the action brought upon this covenant made by another; it should be taken to mean a proof by trial in court. And it was agreed, that the word proof, generally laid, should be understood a proof judicial by jury, confession, or demurrer in court.

And in contracts or agreements, words may be transposed to give effect to the intent, where that is evident.

As,

* As, if a lease be made the 6th of *August* for twenty years, rendering rent *annually* at *Lady-day* and *Michaelmas*; the law will transpose the sentence to *Michaelmas* and *Lady-day*: because otherwise the rent cannot be paid yearly.

[* 406.]
Co. Litt. 217 b.

In contracts or agreements, the executors of the contracting parties are implied in themselves, and bound without naming; if, from the nature of the contract, it appear that the parties so intended.

Thus should one, possessed of a term for years, lease the same for years, and covenant for himself and his executors to renew the lease on the same rent, upon the request of the lessee within the term; if, in such case the lessee should die within the term, and his executors should request the lessor to make a new lease before its expiration, and they should refuse, a court of equity would compel them: for the meaning of such a covenant is, that the lessee may be reimbursed any money that he may lay out in the improvement of the estate; and, therefore, it is immaterial, whether the lessee or his executors require the renewal of the lease, it not being personal.

Hyde v. Skinner, 2 P. Will. 170.

* If money is to be paid by reason of a contract, the terms shall be understood and accepted according to their import where it is to be received; that is, it shall be paid in currency there.

[* 407.]

And, therefore, if a contract be made in *London* to pay a given sum of money, as 100*l* at *Dublin*, the contract will be performed by a tender of 100*l*. *Irish* currency; for, *Consuetudo et statuta loci, in quem est destinata solutio, respicienda sunt*.

Davis 28.

So if money, arising out of an *Irish* estate, be made payable in *England*, it seems that it must be paid in *English* money.

Vide 2 P. Will. 88. Ibid. 696.

And if a man advance money by way of loan, or if another detain his money unlawfully, by reason of which he becomes intitled to interest; that interest shall be according to the value of forbearance in the country where the transaction arises.

Thus where a bond was made in *England* and sent over to *Ireland*, and the money was to be paid there,
but

Sir John Champant v. Lord Ranelagh, Pre. Chan. 128.

[* 408.]

but it was not mentioned*what interest was to be paid; my lord keeper was of opinion, that it should carry *Irish* interest.

Ekins v. India
Com. 1 P.
Will. 396.

So where the value of a ship and cargo was recovered on bill filed against the *India* Company, the transactions having happened in *India*, the master was directed to compute interest on the value, at the rate money bore in *India*.

And if the value of any thing be expressly stipulated in a contract, the value shall be intended as things are, at the time when the contract takes effect.

Vide Dyer,
31 b. 82 b.
9 E. 4. 49 a.

As if rent be to be paid at a given time, at which time a shilling is of the value of twelve pence; and it afterwards become only of the value of six pence, as was frequently the case in former times: if the money be tendered at the time, the lessor shall not afterwards recover any more shillings, than would have paid the rent at the rate money was valued at, when the rent was due and tendered.

[* 409.]

11 H. 7. 5.
Dyer 82 b.
note 71.

* So, if one be to pay on such a day five quarters of corn; and at the day of the contract entered into it is valued at 5^s. and at the day of payment at 5^s. he will be entitled either to five quarters of corn or five pounds.

Speake v.
Speake, 1 Vern.
217. S.C. 1 Eq.
Ca. Abr. 221.
Pl. 7.

So, on a bill to have a jointure, defective in value, made good the husband having covenanted that the lands settled were of a specific annual amount, it was decreed accordingly; but the value of the lands was ordered to be estimated as they were at the time of the jointure settled, and not according to the value at the time of the decree.

Gardner v. Pul-
len, 2 Vern.
394. Sed quære;
for here, the
bill was to be
relieved against
the penalty.

But if, by reason of improper delay, the value of the subject stipulated about is varied between the time of the contract being made, and its being performed, the loss must be borne by the party who was to carry the contract into execution: as if one were bound under a penalty to transfer stock at a given time, and he neglected so to do, and the stock rose in the mean time; he should transfer the stock stipulated in specie, and not so much as it was worth, on the day when he ought to have transferred it.

And

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* And several deeds, made at the same time to effect one object, will be construed as one assurance; but so that each shall have its distinct operation, to carry on the main design [* 410.]

Thus, where a father put his son apprentice, and entered into a bond of one thousand pounds for his fidelity, and, at the same time, took a covenant from his master that he should, at least once in a month, see his apprentice make up his cash: it was held, on a bill filed to be relieved against an action brought on the bond, that the bond and the covenant ought to be taken as one agreement; and, therefore, that the father should be answerable for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began.

Montague v.
Tidcombe,
2 Vernon 518.

So, where a man covenanted by marriage articles to pay the legacies charged upon his wife's estate, and gave a statute, and also a mortgage of his own estate, to secure the same; and by an indorsement upon the mortgage the same was to be void, unless the wife's estate was settled upon him for life, &c. according to the marriage articles; this * indorsement, though upon the mortgage only, was sufficient to discharge the statute and articles: for all the instruments being executed at one and the same time, authenticated by the same witnesses, and part of the same agreement, are all but as one conveyance.

Treatise of
Equity, 49.

[* 411.]

OF DISANNULLING, DISCHARGING, RESCIND-
ING, WAIVING, OR ALTERING, CONTRACTS
OR AGREEMENTS.

THE essence of a contract or agreement being the right vested in one party, and the obligation incurred by the other ; it is clear that every contract or agreement between two or more parties may, at any time before it is to be executed, be rescinded by all parties dissenting or receding from the bargain : for the consummation depends upon the same consent on which the inception of the contract is founded.

Therefore if A. contract with B. that if B. lay him into his cellar three tons of wine before *Michaelmas*, A. will send into his (B's) barn twenty quarters of wheat before *Christmas* ; the parties may by their reciprocal assent, dissolve the contract at any time, before either of those days.

Racon's Max-
ims of the Law
91.

[* 413.]
Ibid.

* So, if two exchange land by deed, or without deed, and neither enter ; they may annul the exchange, by mutual consent, so it be by deed, but not by parol.

Ibid.

Again, if a lessee for twenty years make a lease for ten years, and afterwards, take back a lease for five years, this does not inure by way of surrender ; because a petty lease derived out of a greater cannot be surrendered back again, but it inures by dissolution of the contract : for, a lease of land is but a contract *executory* from time to time of the profits of the land to arise ; as a man may sell his corn or his tythe to spring, or to be received for several years to come.

Upon this principle an agreement may be waived with the concurrence of all parties.

Thus, where lord and tenant had entered into an agreement for inclosing a piece of ground, parcel of a manor on which the tenants had a right of common. To effectuate this, the lord, by a separate instrument had released each particular tenant from all quit-rents and other services ; and the tenants, by another instrument of like date, consented to the

inclosure,

Lady Lanef-
borough v.
Ockshott,
2 Brown Par.
Ca. 116 5 Vin.
P. 3 Ca. 31.
2 Eq Ca. Abr.
257. Ca. 2.
Et vide 3 Chan-
Rep. 116.

OF DISANNULLING, &c.

* inclosure, and released all their right of common in the ground so to be inclosed. The inclosure was set about, but the hedges being privately thrown down, and other obstructions happening, the lord relinquished his design; and the tenants of the manor continued to enjoy their right of common and to pay their quit-rents, and do suit and service at the lord's court in the same manner, as if no such agreement had ever been made; but the instruments, which had been reciprocally executed in consequence of that agreement, were neglected to be cancelled. A question, afterwards, arose, between the alienee of the lord and a representative of one of the tenants, who had paid quit rent, &c. and enjoyed the common for five-and-twenty years after the agreement entered into, whether an instrument, given under this agreement, releasing the right of common, was a good bar to an avowry made upon a distress levied for arrears of quit-rent, due from the defendant as tenant of the manor; or, whether the subsequent transactions, *viz.* the enjoyment of the right of common on the one hand, and the payment of the quit rent on the other, did not amount to a waiver of the agreement? and it was held that they did.

* And, in some cases, *one* of the parties alone may rescind the contract: as in sales with liberty of refusal. [* 414.]

Thus, if any thing be purchased and paid for, but on condition to be returned on certain events stipulated; there, on the event happening, the thing purchased may be returned by the one party, and, upon the return, the contract is annulled by virtue of the *original* terms thereof, without any actual reacceptance or subsequent assent of the other party; for he has no option to refuse to take the thing so sold back. And upon the ground that the contract is annulled, the party having paid his money, and on such a contract, may, on the return of the thing sold, recover it back on an action for money had and received.

But, in contracts executed and consummate, if the first parties have put it in the power of a third person, or of a contingency to give perfection to their acts, they have, thereby, put them out of their own reach and liberty. They, therefore, cannot then rescind or revoke them: as if I contract with you for cloth at

Towers v. Barrett, 1 Term Rep. 135.

Bacon's Max. 91.

OF DISANNULLING

[* 416.] such a price as J. S. shall name, there, *if J. S. refuse to name, the contract is void : but the parties cannot annul it ; because they have put it in the power of a third person to perfect.

Ibid. 92. So if I enfeoff J. S. to the use of such an one as J. D. shall name within a year ; there, if J. D. name A. B. it is not revokable : because the use passeth presently, and the contract is executed by operation of law.

Ibid. 91.
1 H. 7. 14. 15.
B5o. tit. Bar. 69. After the time that a contract or agreement is stipulated to be performed is past, there is a perfection given it by action on the one side, that renders it indissoluble, and not to be annulled. But it may still be released ; there being a difference between dissolving the contract, and a release or surrender of the thing contracted for.

A release may be either express or tacit. The former is accomplished by a regular acquittance or discharge. The latter is, where the party, in whose favor the obligation arises, cancels the obligation, by destroying the instrument by which it may be proved, or the like.

[* 417.] *If he, who is to be benefited by another's fulfilling his contract or agreement, is the occasion why it is not carried into execution ; the contract or agreement is thereby entirely dissolved, and the party bound discharged from his obligation.

3 Rep. 92.
Co. Litt. 206. Therefore if the condition of an obligation be, that the obligor shall enfeoff the obligee of *certain* land before such a day ; and then before the day, the obligee disseises the obligor, *and keeps the land by force* until after the day, so that the obligor cannot enter : this will excuse the performance of the condition.

25 H. 6. 11.
Barr. 162. cited
3 Rep. 91. So, if one lease a house, by indenture, on condition that the lessee shall not permit any lewd woman to reside within it, if he be warned thereof by the lessor ; and that, if he do not turn her out within six weeks after warning by the lessor or his servant, that the lessor shall re-enter : the lessee may plead, that the lessor ousted him with force, and, against his will, put such woman into possession, and made her continue there with force, against the lessee's will, for six weeks, &c.

12 E. 4. 8. b. 1 So, where one covenanted, by indenture, to build

A G R E E M E N T S.

* build him a house of certain dimensions within a certain time for ten pounds, and an action of covenant was brought for nonperformance of the contract; the defendant pleaded, that he went and was ready to have built the house, and that the plaintiff commanded him that he should not build it, by reason of which he left it undone : and, on demurrer, *Littleton* held this a good plea ; for, if the carpenter had come on to the plaintiff's premises after this command, the plaintiff might have had an action of trespass against him for his entry, and, therefore the commandment was a sufficient discharge to the carpenter. [* 418.]

So where a lessee for five years covenanted to build a mill within the term, and, because he had not done it, the lessor brought an action of covenant ; it was held a good plea to say, “ that the lessor *forcibly* held him out during the last three years of the term, so as that he could not build it.”

Godb. 7c.
18 E. 4. 2. b.
Pl. 6.

And where a lessee for years covenanted to drain the water which was upon the land, before such a day ; and, afterwards, the lessor entered before the day and held him out and * disturbed him in doing it : this disannulled the covenant.

Carrell v. Read.
Cro, Eliz. 374.

[* 419.]

Again, it is held, upon the same principle, that if A. be bound to B. that J. S. shall marry G. before such a day ; and, before the day B. marries her, he shall take no advantage of the condition : because by his (B.'s) means, it could not be performed.

Co. Litt. 206. b.

So if A. be bound to B. in a bond, conditioned to convey to B. his manor of *Dale* at such a day ; and at the day, A. come to B. and tender him livery and seisin, and he refuse : A. is discharged for ever.

18 E. 4. 9. a.
Pl. 12.

And if one be bound to me in 20*l.* upon condition to pay 10*l.* at the feast of *Easter* ; and, at that feast, he offer me the 10*l.* and I refuse, the bond is discharged for ever.

Ibid.

So if a man be bound to appear at a day, and, before the day, the obligee cast him in prison, the bond is void.

Noy's Max. 124

And, in such cases, the party bound to performance will be in the same condition as if the agreement had been
been

[* 420.] been fulfilled by him : *for, * if he whom it concerns to have my part of the covenant fulfilled, is the occasion why it is not, it is the same thing to me as if it were fulfilled.*

Co. Litt. 210, b.

Thus, if a man make a feoffment in mortgage, upon condition to be void upon payment of money by the feoffor, &c. to the feoffee, at a day ; if, at the day, the feoffee is out of the realm, the feoffor is not bound to seek him, or to go out of the realm to him : and then, because the feoffee is the cause that the feoffor cannot tender the money, the feoffor may enter into the land, as if it had been duly tendered.

18 E. 4. 8. b.
Pl. 12.

So, in the case before stated, where a carpenter covenanted to build another a house upon his land for 10*l.* and came prepared so to do, but was ordered by him to desist : the carpenter, after such command to desist, might have maintained an action for the 10*l.*

The *right* accruing by virtue of a contract or agreement, may also be lost by abandonment.

[* 421.]
Orby v. Trigg,
9 Mod. 2. 3.

Thus, where one mortgaged lands, and, in * the deed of mortgage there was a covenant to re-convey upon six months notice of the payment of the principal sum and interest ; and also a covenant that, in case the estate was to be sold, the mortgagee should have the pre-emption, (it appearing, that, after the death of the mortgagor, an agreement had been entered into for the sale of the estate to another person, and that neither that person nor the heir of the mortgagor, knew any thing of this covenant, the counterpart of the mortgage deed having been delivered up to the attorney of the mortgagee, who had denied giving any copy, but had insisted on payment of the principal and interest, on the ground that the security was too narrow for the money he had lent, and threatened foreclosure ; but had never mentioned, that the mortgagee was to have the benefit of pre-emption, until after the estate was sold) it was held, that he should not claim it to the prejudice of the purchaser and the heir, after having had so long a time in which he might have so done before the estate was sold. And the court decreed accordingly.

And, upon this principle, it has been held, that, if a binding

Powell v. Han-
key, et al. 2 P.
Will. 82.

binding agreement be entered into* by husband and wife, previous to their marriage, respecting her property, the effect of which is to give her an exclusive right to it as her separate estate; yet, if she constantly permit her husband to receive the interest of it, if it be personal estate invested in the funds or securities; or the rents and profits, if it be a real estate; the law will intend that she consented to her husband's receipt of it: and a contrary inference would be a hardship on the husband, who, probably depending upon the wife's permitting him to receive this separate estate as a gift, may, on such a presumption, have lived in a more plentiful manner, the comfort whereof the wife must have shared in; and if she, at a future period, were allowed to make her husband debtor for this money, this might ruin the husband; or, in case of his death, prove equally prejudicial to his children.

But this intendment of law, may be rebutted by parol proof, that the wife had no design to abandon her right to such separate estate. And, therefore, where a woman had 300*l.* *per annum* settled upon her as pin-money, of which 200*l.* *per annum* only had been paid her by her husband for some years* before his death; she was, on a bill filed in Chancery for that purpose, let in to have the arrears made a charge on her husband's assets, on producing evidence, that often, on her complaining of being paid short, her husband had told her that she should have it at last.

A contract of a lower degree, may likewise be determined or annulled, by accepting a contract of a higher degree for the same thing.

And, therefore, if a man be indebted to me by simple contract, and, afterwards, enter into a *bond* or *obligation* to me for the same debt; the simple contract is thereby determined: for, otherwise, the debtor would be doubly charged.

(*) So, a judgment obtained, determines a contract for the same sum. Therefore, if a man recover in debt upon a contract, and omit to take out execution, yet he cannot have a new action of debt upon the contract; because the nature of the duty is changed by the judgment of record.

But

(*) 6 Rep. 45. 9 E. 4. 50 b. 51 a.

[* 422.]

Ridout v. Lewis, 1 Atk. 269.

[* 423.]

6 Rep. 45 Dyer
21 b. Bro. tit.
Contract. 29.
3 H. 4. 17 b.
1 H. 6. 8. a 10
H. 7. 21 a. Fitz.
Nat. Brev. 281.
Contra, if a
stranger give
bond for the
debt, vide ibid.
note (d.) Fitzh.
Abr. tit. Debt.
83. Dyer 230 b.
01, if the deed
be only indent-
ed and sealed,
and not deliver-
ed or made an
especialty,
Fitzh. tit. Debt
68. 1 H. 6. 8. a.

[* 424.]

Vide Lutter-
ford v. Peter le
Mayre, Cro.
Jac. 579. et vide
Cro. Eliz. 817.
Bro. tit. Con-
tract, &c. 38.
11 H. 4. 79 b.
13 H. 4. 1.
6 Rep. 45.

But contracts of equal degree do not * extinguish or determine each other; and therefore a bond given for the same debt for which another bond has been previously given, is not sufficient to avoid the former: for its operation is but to give another action upon a bond. And, *a multo fortiori*, a new bond is not sufficient to discharge a judgment.

And, upon the same principle, it is held that, if the obligee in a bond accept of a bond in nature of a statute staple for the same debt, and in full satisfaction of the bond, yet this is no discharge: for, a statute staple, or bond in the nature thereof, is but a bond recorded; and one bond, be it of record or not of record, cannot merge another.

Preston v. Per-
ton, Cro. Eliz.
817.

So, if two records be of equal degree, the one cannot determine the other. And, therefore, where a *scire facias* was brought in Chancery upon a reconu-
fance there, and the defendant pleaded to issue, and the issue was sent to the King's Bench to be tried, and found for the plaintiff, and judgment given for him there: and then, the plaintiff brought debt in the common bench upon this judgment, and had * judgment there also to recover; and, afterwards, brought a *scire facias* in the King's Bench, to have execution upon the judgment; the latter recovery was pleaded in bar of that execution, whereupon the plaintiff demurred. And the court held that it was no plea; because the one judgment cannot determine another judgment which is of equal nature, no more than one obligation can determine another.

[* 425.]

Vide supra,
317—223.

And we must carefully distinguish between cases, where the insertion of parol contracts or agreements in deeds, is merely by way of recital, or with a view to corroborate them, and enlarge the remedy for enforcing them; and cases of the nature before alluded to, where the contract itself is intended to be put under seal, and turned into a specialty: for, in the former cases, the specialty does not alter the nature of the contract; but the party having a right to require performance, may, at his election, proceed either on the parol contract, or the specialty.

Contracts, entered into by deed, cannot be discharged or disannulled, by act of the party by parol: therefore,

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therefore, the merely * delivering up of an indenture of covenant, bill, or bond to pay a sum of money, will not discharge or avoid the obligations created by them. Consequently, it is no plea to an action of debt upon bond, &c. to say, that the obligee re-delivered the bond to the obligor in lieu of an acquittance, if the obligee has regained the possession of it. And, upon the same principle, accord and satisfaction is no discharge of a covenant; for a covenant, being created by deed, cannot be discharged but by deed.

Nay, even payment itself is no plea to a bond; for it must be discharged by matter of as high nature as itself; and, therefore, admits of no plea of any act of the obligor, but that of a release under seal.

But, where a wrong, or default subsequent, together with a deed, gives an action to recover damages (which are only in the personalty) for such wrong or default; there, the damages may be discharged by matter of fact or parol: as if one by indenture of lease, covenant to repair and maintain houses in reparation, from time to time during the term demised; in such case, accord and * satisfaction is a good discharge for the damages demanded, by reason of the breach of the covenant: but the covenant remains.

Although it be generally true that, at law, a parol agreement will not be admitted to contravene the terms of an agreement contained in a deed, or any other agreement in writing; yet, in some cases, it is otherwise in equity: for there it is held, that parol evidence may be admitted to rebut an equity; and, a specific execution being an equity, those courts will, under some circumstances, admit parol evidence to shew, that a written contract or agreement has been waived in part, or in the whole, or varied in the terms of it, by a subsequent parol agreement. As if, after a mortgage made with interest reserved at five *per centum*, the mortgagee, upon representation by the mortgagor that the estate will not afford to pay so high an interest, agrees to reduce it to such rate as a third person shall name, and the third person mentions three *per centum*, and that is assented to: in such case, the latter agreement, altho' by parol, will control the former. And, if there be any denial of it, a court of equity will direct an issue to ascertain the fact.

[* 426.]
1 H. 7. 14. 15
Bro. tit. Bar. 69.

Cro. Jac. 92.
Lutw. 358.
contra Roberts
v. Stoker.
2 Rolls Rep.
110. S. C. Palmer
110.

Snow v. Franklin.
Lutwich
358. Alden v.
[* 427.]
Blague, Cro. Jac.
99. et Blake's
case, Noy. 110.
S. C. 6 Rep. 43.

Lord Milton v.
Edgeworth. 6
Bro. Par. Ca.
580.

Upon

OF DISANNULLING

[* 428.]

Gorman v. Salisbury, 1 Vern. 240.

Legal v. Miller,
supra, et 2 Vez.
299.

* Upon this ground the lord keeper, in the case of *Gorman and Salisbury*, dismissed a bill, which was brought to have an agreement executed in specie.

So in the case of *Legal and Miller*, it was held, that an agreement bearing hard upon one of the parties was waived; a new and different agreement by parol being shewn.

And such new agreement by parol, if in part executed on one side, will be decreed to be specifically performed on the other.

5 Vin. Abr. 522.
Pl. 38, 2 Eq. Ca.
Abr. 48. 16.

Thus, where W. leased an house to N. for eleven years, and was to allow 20*l.* to be laid out in repairs: the agreement was reduced into writing, and executed by both parties. N. repaired the house; and finding that it would take a much greater sum than the 20*l.* told W. of it, and that he would nevertheless go on and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen years, or as many as N. should think fit. W. replied, that they would not fall out about that. W. afterwards declared that he would enlarge the term, without mentioning any time in certain. On a bill to * compel an execution of the agreement according to these latter terms, the Master of the Rolls said, that, before the statute, written agreements could not be controled by parol agreements of a contrary import, or altering them, but that this was a new agreement; and the laying out the money was a performance on one part, and that, therefore, it ought to be carried into execution on the other part.

[* 429.]

Vide infra.

But we must carefully distinguish these sort of cases, from cases of secret agreements, made to impose upon parties, to other agreements, by altering the terms of them.

Per Lord Hard.
in *Buckhouse v.*
Crosby, 2 Eq.
Ca. Abr. 32, 33.

In all cases where parol agreements are set up, in equity, to shew a waiver or alteration of contracts in writing respecting lands, a very clear proof of the former will be expected; for the statute of frauds and perjuries requires, "that all contracts and agreements concerning lands, &c. should be in writing." Now, an agreement to waive a contract for a purchase, is as much an agreement concerning lands, as the original contract itself is. And Lord *Hardwicke* thought, that proof of a parol waiver of an agreement for a sale

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* of land by two persons (one of whom was then tenant of the land, and paid rent to the person on whose behalf the waiver was, and who was mortgagee of the estates; and the other of whom was proved to have declared that he was to share in the purchase) was insufficient to discharge a contract in writing.

[* 430.]

And where a decree having been made, the defendant to a bill to execute the decree by way of answer, set forth a parol agreement in bar, to which the plaintiff demurred; the demurrer was allowed, though the agreement was subsequent to the decree: for, it was said, that the decree should proceed, and if the defendant would have advantage of the agreement, he must bring an original bill; because, if he should have advantage of it by way of defence, one witness would serve his turn; but, if the defendant in his answer to an original bill denied the agreement, one witness would not convict him: so that by this way of answer, the plaintiff in this suit would lose the benefit of his answer in an original suit, instituted upon the latter agreement.

Wakelin v.
Wakelin,
2 Chan. Ca. 8.

But, it is not only contrary to the letter * and spirit of the statute of frauds and perjuries, but to the rules of the common law before that statute was in being, to add any thing to an agreement in writing which is complete, and reduced into deeds and writings; by admitting parol evidence to explain it to have been meant to operate otherwise than the language in which it is conceived imports: and, therefore, such evidence ought in all cases to be laid aside, and no advantage taken of it on either side.

[* 431.]

Thus, where the portion of a wife appeared by settlement, made on her marriage, to have been 5,300*l.* and it was proved that, at the time the settlement was executed, the wife gave a bond, signed by her, to the husband's father, in the penalty of 1400*l.* for securing 700*l.* but the husband in his own hand wrote at the bottom, *I own this to be my debt*: Lord Hardwicke was of opinion, that he was obliged to lay out of the case all parol evidence that had been read to explain this transaction and that no advantage ought to be taken of it on either side.

Partridge v.
Powlett, 2 Atk.
384.

So where, on a bill brought for dower the defendant,

Tinney v. Tinney, 3. Atk. 8,

[* 432.] the heir at law, insisted, that * the husband in his lifetime gave a bond in the penalty of 1000*l.* in trust to secure to his wife 500*l.* in case she survived; and that it was intended at that time in lieu of dower; and that she acknowledged it to be so; and offered to read evidence of her acknowledgment; the lord chancellor was of opinion, that parol evidence could not be allowed in this case, it being a case within the statute of frauds and perjuries.

But we must be careful to observe the distinction, between instances of the nature of those last-mentioned, where the evidence offered is to explain a written agreement, complete in itself; and cases where parol evidence is offered to shew, that something, intended to be inserted in an agreement, has been omitted by mistake or fraud: for the latter is a very common defence, in a court of equity, to a bill for a specific performance; and there is no doubt but that such evidence ought to be received; and it is quite equal, whether it be insisted upon as a mistake or fraud.

Joynes v. Sta-
tham, 3 Atk.
388.

[* 433.]

Thus where a bill was brought to carry into execution an agreement for a lease of a house during the life of the defendant's wife, * which was written by the plaintiff and signed by the defendant, the lessor only, who could not write, but made his mark. The defendant insisted by his answer, that there ought to have been a clause inserted in the agreement, that the tenant should pay the rent clear of taxes; but that the plaintiff, having written the agreement himself, had omitted it; and that the defendant, unless this had been the agreement, would not have sunk the rent as he had done from 14*l.* to 9*l.* *per annum*; and the defendant offered to read evidence to shew that this was part of the agreement and it was said, that this evidence ought to be rejected, as contrary to the statute of frauds: but Lord *Hardwicke* allowed the evidence of the omission in the lease to be read.

Ibid. 389.

So if, on an agreement for a mortgage *drawn by the mortgagee* the mortgagor being a *marksman* (that is, unacquainted with the art of writing) the mortgagee omit to insert a covenant for redemption, the mortgagor will in such case be at liberty, in a court of equity, to insist upon reading evidence to shew the omission.

So.

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So, if a mortgage be drawn in two deeds, * one an absolute conveyance the other a defeasance; and there be an omission by the mortgagee to execute the defeasance: the mortgagor shall be permitted to shew the mistake.

Again, where, by agreement, the South-sea company were not bound to answer for any irregularity by supercargoes, unless information was given in two months after their return home; the instrument was drawn up on board the ship and in a great hurry, and executed there by the party, who, when he got out to sea and read it over, found it was six months instead of two, and brought a bill to be relieved against the variation in the instrument: Lord *King* sent it to an issue on the question, Whether it was the original agreement that it should be two instead of six months? and the verdict being in favour of the plaintiff, that the agreement was designed to be in two months, a decree was made to relieve the plaintiff against any difficulty by that variation.

But the true ground upon which the last mentioned decisions appear to me to rest, is, that the proof offered is *no variation* of the agreement, but consistent therewith, and * explanatory of it only: and that strong circumstances of fraud or mistake pervade all of them: for such evidence is never suffered to contradict or explain away an *explicit* agreement; because that is, in effect, to vary it in respect of things *specifically expressed therein*: and courts ought to be very cautious in admitting any evidence to supply or explain written agreements in specific circumstances expressly stipulated; for otherwise, the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the primary object.

Thus where M. and H. had the occupation of certain closes of lands belonging to M. called A. Close and B. Meadow; and C. and his partner came to an agreement with them, by a memorandum in writing signed by all the parties, and attested by one D. whereby C. and his partner agreed to exchange their copper-mill, &c. with M. and H. in consideration of the grass and vesture of hay to be taken by C. and his partner off B. Meadow, and articles were to be made accordingly; but no mention was made in the agreement respecting A. Close,

South-sea company v. D'O-
liffe, cited
2 Vez. 377.

[* 435.]

Meres, et al. v.
Ansell, et al.
2 Wils. 275.

[* 436.] Close, and only of *a special particular interest in B. Meadow. Upon this transaction a question arose at *nisi prius* on an action of trespass, whether C. and his partner were not entitled to the possession of A. Close, as well as the hay of B. Meadow? and to substantiate this claim, D. the subscribing witness, was called, and proved the written agreement, and further deposed that it was, at the time of signing the agreement, agreed by the parties by parol, that C. and his partner should not only have the hay off B. Meadow, but also the whole possession of the soil and produce of A. and B. And the question was, whether this evidence was admissible? *Et per curiam*, We are all clearly of opinion, that no parol evidence is admissible to disannul and essentially to vary a written agreement.

Preston v.
Merceau.
Blackst. Rep.
1249.

[* 437.] Upon the ground of these distinctions it was also decided in the court of Common Pleas, on an action on the case for use and occupation of an house, of which it was agreed in writing, a lease should be let by A. to B. for twenty-one years, at 26*l.* *per annum*, to commence, &c; that parol evidence, offered by the plaintiff on the trial, to shew that, besides the 26*l.* *per annum*, the defendant had *agreed to pay 2*l.* 12*s.* 6*d.* a year, being the ground rent of the premises to the ground-landlord (but no evidence offered of the actual payment of such ground rent) was inadmissible. And thereupon lord C. J. *De Grey* nonsuited the plaintiff. And on motion to set aside the nonsuit, the rule was discharged, *Blackstone* and *Nares* Just. observing, that this was a positive agreement that the tenant should pay a specific rent of 26*l.* could the court then admit proof that this meant 28*l.* 12*s.* 6*d.* It was nothing to the tenant to whom the rent was to be paid, if he was obliged to pay more than his contract expressed. The court could neither alter the rent nor the term, the two things *expressed* in the agreement. With respect to collateral matters, it might be otherwise, the plaintiff might shew who was to put the house in repair, or the like, concerning which nothing was said; but he could not by parol evidence shorten the term to *fourteen*, or extend it to *twenty-five* years, or make the rent other than 26*l.* a year. *Blackstone*, Just. said, that the case of *Joyes* and *Statham*, was the case of a mere executory act, in which the master was to settle the proper covenants, and therefore had a right to enquire who was,

Supra 432.

was to pay the *taxes. Besides there were strong suggestions of fraud in making the written agreement, as one party could neither read nor write. [* 438.]

And, except in the instances before-mentioned, the rules of evidence are universally the same in courts of law and courts of equity. Therefore it, in the before-mentioned case of *Meres* and *Ansell*, a bill had been filed in equity for a specific performance of the agreement; the court would not have admitted the parol evidence there tendered. 2 Will. 276.

But to return to the subject of disannulling contracts or agreements. Supra 435.

Where the right and obligation meet, and unite in the same person, the contract, generally, is thereby dissolved; for, since a man cannot be *his own* creditor and debtor, it follows, that if a man becomes representative to his debtor, his action ceases, there being no object on whom it can attach. This is termed in the civil law *confusion*. Therefore, if the creditor make his debtor his executor, the debt, as *between them*, is vanished.

So, if a man be bound in an obligation to *a feme sole, and afterwards take her to wife; the contract is dissolved, by act of law, by the union of the right; and the obligation in him. [* 439.]
1 H. 7. 16. a. b.

Again, if a man had been indebted by bond to a villain, and had afterwards purchased the manor to which he was regardant; the obligation had, by act of law, been gone. Ibid.

And, since the statutes for setting off mutual debts have been enacted, contracts creating debts, may, in cases where the sums are equal (provided the debts are of the same nature) be extinguished by compensation: as by opposing debt to debt, whereby a man ceases to owe me, because I owe him *as much* of the same kind, by a contract of the same nature. For, since, where debts are mutual, I must, if I receive, immediately refund as much; the legislature, to abridge such needless payment, allows each party to pay himself by retaining his own, and to plead the one in bar to an action for the other. 2 Geo. 2. cap. 22. 8 Geo. 2. cap. 24.

But where the sums are unequal, there, the lesser must be set off, and will be a discharge of the contract *pro tanto*. Bull. ni pri. 179.

But,

[* 440.]

* But, this mode of compensation does not take place, except between those who are creditors and debtors to each other in their own right ; and, therefore, a debt, due to a man in right of his wife, cannot be set off in an action against him on his own bond.

Ibid.

Ibid.

So a set-off cannot be pleaded to a bail bond, not assigned to the party ; because it is not within the 8 Geo. 2. ; for that statute relates only to bonds conditioned to pay money, and not to bail bonds : nor is it within the 2 Geo. 2. ; because the plaintiff does not bring the action in his own right, but as trustee for another.

Ibid.

But, if there be mutual debts subsisting between a man's testator and J. S. the executor will be indemnified in setting off J. S. 's debt against his testator's without bringing an action against him ; for, so far the executor and his testator may be esteemed the same person : and, therefore, compensation may take place between him and his testator's creditor, in like manner as if his testator had been living.

[* 441.]

It was formerly doubted, whether marriage was not an act of such a nature, as to * extinguish any contract or agreement made between the intended husband and wife previous thereto, where no trustee was interposed.

Dame Ducey v. Chute, et al.

1 Ch. Ca. 21.

S. C. 3 Chan.

Rep. 4. Et. vide

S. L. Pridgeon,

v. Pridgeon,

ibid. 117.

Heeding v. Davis,

Skinner

409.

Quere, If here

was not an a-

bandonment

by the wife ?

Thus where B. (A being a widow, and seised of a jointure worth 700*l. per annum*) made suit to her to marry her, and, she agreeing to it, he, before the marriage, agreed with her, by deed in writing, that it should be lawful for her, or such person as she should appoint during the coverture, to receive and dispose of the rents of her jointure as she pleased ; the deed was put into the hands of a person who had formerly been A.'s agent, and after the marriage, A.'s agent uniformly received the rents of the jointured lands, and constantly, with the approbation of A. accounted for, and paid the same to B. but after B.'s death, A. exhibited a bill against her husband's executor and the agent, charging 1000*l.* to have been received in B.'s life-time, and to be resting in the agent's hands unaccounted for, to which she made title under the agreement made between her husband and herself before marriage : upon the hearing the court declared, that this agreement made before marriage with A. herself,

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was immediately by the * marriage extinguished, and refused relief thereupon. [* 442.]

But a distinction was made, at law, between a promise which was not to be executed until after the coverture determined, and a promise to be executed during the coverture : the former having been held not to be extinguished by the marriage, as the latter was clearly held to be.

This point appears to have been first agitated in the case of *Smith* and *Anne*, his wife, against *Stafford* ; wherein the former declared that, upon speech of marriage had between *Anne* and the defendant's testator, he promised if she would marry him, and he died before her, he would leave her worth an hundred pounds ; and that she did marry him, and that he died and left her not worth an hundred pounds. And, upon non-assumpsit and verdict for the plaintiff, it was moved in arrest of judgment, that the promise was released, in law, by the marriage : against this it was objected, that the action could not arise during the coverture ; for it was not to be performed until after the death of him who made the promise. And, on this ground * it was held by three judges against the opinion of *Hobart*, that the action well lay.

Smith, et uxor,
v. Stafford,
Hob. 216.

[* 443.]

A similar judgment was affirmed in a writ of error in the Exchequer Chamber, in the case of *Clark* and *Thomson*, the above case being there cited as in point.

Clarke v.
Thompson,
Cro. Ja. 571.

And, in the case of *Gage* and *Adon*, it was held by *Gould* and *Turton*, Justices, against the opinion of *Holt*, C. Justice, that a bond conditioned to be void, "in case the obligor and obligee intermarried, and the obligee survived, and the obligor left her 1000*l.*" was not extinguished by the marriage ; because to avoid it would subvert the marriage agreement. And they held, that the debt was only suspended, and the rather, because it was not payable during the coverture, but was a debt on contingency ; so that if the feme *dum sola* had released all demands, the debt had not been extinguished.

Gage v. Adon,
Salk. 325.

And, in the case of *Pridgeon* and *Pridgeon*, a like distinction was taken in equity, between an agreement betwixt baron and feme made before marriage ; that the wife might, by will, dispose of part of her estate, or

Pridgeon v.
Pridgeon,
1 Ch. Ca. 117.
Et vide Smith
v. Stafford,
Hob. 216.

for

[* 444.]
Et Cio. J^a. 571.
2 Mod. 171,
273.

for a thing * which was future to the marriage, and an agreement which was to be carried into execution *during the coverture* : inasmuch as, in the former case, the agreement was held not to be dissolved thereby, upon the ground that it was no duty during the coverture ; whereas, in the latter case, the agreement was extinguished by the marriage.

Vide 2 Vez.
191.
Ibid. 665.

And since agreements, for settling estates to the separate use of the wife on marriage, have become very frequent, courts of equity, and also courts of law, have viewed the stipulation entered into by the parties on the occasion of marriage in the most liberal way ; and it is now undoubtedly settled that, where there is an agreement between husband and wife *only*, before marriage, that the wife shall have to her separate use either the whole, or particular parts of her personal estate, she may dispose of it by act in her life, or by will, and that by either of these modes, though nothing be said of the manner of disposing of it.

[* 445.]

Contracts and agreements may also be annulled or altered by act of the legislature ; for, in all cases of contracts and agreements, the parties must be supposed not to have consented, * but under a tacit condition that they shall be discharged, if the state throw any obstacle in their way.

Winnington v.
Briscoe.
8 Mod. 51.
Et vide Bowes
v. Lord Shrews-
bury, 5 Brown
Par. Ca. 269.
Et S. C. supra.
Et Stent v.
Bailes, 2 P.
Will. 218.

Thus where A. bought 10,000*l*. South-sea stock of B. on the 10th of *August* 1720, for which he agreed to pay 11,250*l*. and had paid 3000*l*. part of the money, and B. promised to give him receipts for the 10,000*l*. stock as soon as the books of the company were open ; but before they were opened, an act of parliament was made, prohibiting any more receipts to be given out, &c. Whereupon A. brought his action against B. for the 3000*l*. he had paid A. as so much money received to his use ; the question was, whether the failure to deliver the receipts should subject B. to this action ; or, whether B. might not have an action against A. for the remaining 8250*l*. ? and the court was of opinion, that the agreement, having become impossible to be performed by reason of the act of parliament intervening, should prejudice neither party.

But if the legislature interfere, so as to render a performance as to part only of the thing contracted for illegal ; the agreement will, nevertheless, be binding as

to the residue, *and a court of equity will enforce the execution of it; for, in such case a man is bound in conscience to do all that is in his power, the interposition of the legislature not discharging the parties from the performance of so much of the contract as remains lawful: therefore where a dean and chapter, before the disabling act made a lease of lands in *London* to build on for ninety-nine years, and covenanted to renew, at the expiration of that term, for ninety-nine years more; they were decreed, although the covenant was entire to make such a lease as was in their power; namely, a lease for forty years, which was allowed by the statute of the 14 Eliz. c. 11.

And a man may be discharged from his contract or agreement by the act of God; for when a thing is prescribed to be done or omitted, if, by the act of God, the thing stipulated become physically impossible, the person obliged shall not receive any prejudice for not executing what is stipulated, if every thing be performed without laches, that the parties might perform: because it would be unreasonable, that those things which are inevitable, which no industry can avoid, nor policy prevent, should be construed to the * prejudice of any person in whom there was no laches: as if a lessee covenant to leave a wood in as good plight as it was in at the time of the lease, and, afterwards, the trees are blown down by tempest, the covenant is discharged *quia impotentiam excusat legem*.

And there is no difference in this respect between a covenant and an assumpsit; for an assumpsit is a covenant *by parol*, and a covenant is an assumpsit *by deed*.

And the law is the same, where a thing which is due in specie, so that it cannot be discharged by an equivalent, is destroyed without any default in the debtor, or any delay in returning it.

Therefore, where in assumpsit, the plaintiff declared that, in consideration that he had lent a grey gelding to C. to his use to ride, &c. C. then and there promised to re-deliver it when required, but that he had not done so, although he had been required; and C. replied that the horse, in consequence of divers diseases, died, whereby it could not be re-delivered: this, on demurrer, was held a good plea; for, performance

1 G g

being

[* 446.]

Vide Dr. Bentsworth v. Dean and Chapter of St. Paul's, 2 Eq. Ca. Abr. 26. Ca. in Ch. 66. 3 Bro. Par. Ca. 389. 10 Mod. 263.

[* 447.]
45 E. 3. 6. 2.
Nov's Max. 354
1 Rep. 98.

Williams v. Hyde, et al.
Palmer 548.

[* 448.] being become * impossible by the death of the horse, the contract was discharged.

Fitz. Dett. 143.
27 E. 3. 84.

So, if A. contract with B. to serve B. for a year for 20s. to be paid at two several times, and B. die after the first time passed, and before the last time of payment; A. *shall be barred of the rest of the salary*; for, by the death of B. he cannot serve him, and, therefore, the contract is determined.

But, although an agreement cannot, by reason of the act of God, be performed according to the words, the party shall, nevertheless, perform it as near the intent of the agreement as he can.

Chapman v.
Dalton, Plowd.
284.

This was so determined in the case of *Chapman and Dalton*, in *Plowden*. There, a covenant was made in a lease for twenty-one years, that the lessor, after the expiration of the said term, should make, or cause to be made to the lessee and his assigns, a further demise of the lands so letten for a term of twenty-one years, next and immediately following the aforesaid term of twenty-one years before named, in the said indenture aforesaid specified and contained, &c. The lessee died

[* 449.]

* within the first term: and the question was, whether the executor of the executrix of the lessee, had a right to call for the new lease. And it was contended that, by the death of the lessee, the covenant became impossible to be performed by the act of God; for, that the new lease ought to be made unto the lessee and his assigns, and he is dead before the time limited for the making it, and therefore the lease cannot be made according to the limitation; for, it ought first to vest in the lessee, and the party ought not to perform it in other manner than the agreement was made. But it was contended on the other side and determined, that, admitting the meaning of assigns here to be, that it should be only to him and to his assigns, as *habendum* to him and to his assigns, so that assigns were words of limitation; yet the lessor ought to make the lease to the executor of the executrix of the first lessee, and that he should not be discharged of the covenant by the death of the first lessee to whom it was made: because the substance of the agreement was that the estate should be made, and that the interest should be had and the person to whom it should be made was not the principal point of the agreement. And where
the

the lease was limited to be made at a * day to come, it was then known and considered by each of the parties, that he to whom the lease was made was subject to death, and that it was probable he might die before the lease was made. And therefore it could not be presumed that the party intended to have the agreement dissolved by his death, or that the other intended by such event to be discharged from making the lease; but it shall be presumed that it was the intent of both the parties that the lease should be made, notwithstanding the death of him that should take it. And he has left others behind him able to take the lease, viz. his executors; and he who is to make it receives no more damage by making it to the executor, than by making it to the testator. Therefore, although it is impossible for him to perform the covenant according to the words, yet he shall perform it according to the intent.

[* 450.]

Upon the same principle, where a condition of a bond was to settle certain lands in such a manor by such a day, and the obligor died before the day, so that the bond was saved at law by the act of God; the lord chancellor notwithstanding decreed the lands to be settled; and so it has often been done.

Holtham v.
Ryland, 1. Eq.
Ca. Abr. 18.
Ca. 8.

* the parties to a contract or agreement, may discharge it by any collateral satisfaction agreed upon. As if A. be bound to B. to pay him 100/. B. may take any collateral satisfaction for it.

[* 451.]
7 Mod. 144.

But the act of a third person will not vary a contract or agreement; as if A. bind himself in a bond, with a condition that a third person shall appear to an action upon eight days warning, and that if he be condemned, then A. will answer the condemnation. If the third person appear in an action without eight days notice, and is condemned, that shall not forfeit A.'s bond; for he being a third person, cannot do an action to alter the terms of A.'s agreement. So, if A. be bound to B. on condition to pay C. 100/. there C. shall not receive any collateral satisfaction to save the bond; for he cannot alter the terms of an agreement made between strangers.

Ibid,

So, if A. assume that, if B. who has taken out administration to C. will, at the instance of D. relinquish the administration, and consent that A. shall have it; that he will save D. harmless of a bond in which

Leate's case,
W. Jones 441.

OF DISANNULLING, &c.

[* 452.] which he is * indebted to C. and B. relinquish the administration, but not at the instance of D. this will not entitle D. to recover upon this assumpsit,

END OF THE FIRST VOLUME.

E S S A Y

UPON THE

Law of Contracts

AND

Agreements.

By JOHN JOSEPH POWELL, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

Ista veritas, etiamsi jucunda non est, mihi tamen grata est.
Cic.

IN TWO VOLUMES.

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1802.

OF THE REMEDY TO ENFORCE AGREEMENTS IN LAW AND EQUITY.

CONTRACTS, being the subject of both legal and equitable proceedings, and made for the benefit of certain persons, pre-supposing also property and price; *they*, if not gained improperly, nor made in opposition to the municipal laws, ought to be by these laws enforced: For what can be more consonant to good faith between men, than the observance of those things which they have, *themselves*, stipulated and made a law between one another. In adjudging on contracts, therefore, respect ought first to be had to carry into execution the specific thing agreed for, if that can possibly be obtained; and if the specific thing contracted for cannot be obtained, then a sufficient equivalent.

But the common law of *England* is very defective in this respect, where an actual * performance of that which is contracted about is not obtained, which, from a variety of circumstances, is *frequently* impracticable: For executory agreements, in the eye of the common law, were, and are still, looked upon but as a personal security; and as entitling the person injured by the breach thereof to damages only, which may be procured by an action of covenant if there be a deed, or by an assumpsit if there be no deed.

7 Mod. 143.
[* 2.]

Thus if a man covenant to settle his lands upon his marriage, or to convey them for a valuable consideration; the covenantee, *at common law*, can only recover damages for the breach of such covenant, and has no remedy there to enforce the settlement of the thing itself.

This defect in the common law, may, perhaps, be imputed to the genius and notions of the antient *Saxons*, who carried the love of liberty to the utmost excess, and deemed any encroachment upon it insupportable. It was natural for men of such sentiments, who considered the being compelled to do any act at the precise time, or in the precise manner appointed or required, as beneath the condition

[* 3.]

* condition of a freeman (which sturdy disposition of our ancestors, gave rise to the practice of effoins) to hold the being obliged to deliver a thing promised, but which, according to their own principles, still belonged to them, the property not being changed by the promise, as an *infringement* on liberty: They, therefore, thought it sufficient, in cases of this sort, where the buyer was frustrated of a thing on which he depended, to allow him an adequate compensation.

But the end of all contracts being the actual accomplishment of the thing stipulated, this measure of damages by no means answered the object proposed, and was an imperfect remedy. Upon this ground a court of equity interfered, and dealt with the corrupt conscience of the party, when he refused to perform what he had stipulated: and to make the remedy adequate to the mischief, that court directed *that* to be done which a man in honesty and conscience ought of himself to have done: Namely, the estate itself to be settled; or it decreed a delivery of the thing itself; or a performance of what was stipulated according to the contract.

[* 4.]

* However, there are some cases where the common law enforces a specific execution of an agreement. As by assumpsit for money had and received, or paid, &c. which is virtually a bill in Chancery for a specific execution. So in cases of covenants real to convey or dispose of lands, for which the remedy is, by a special writ of covenant for a specific performance of the contract concerning certain lands particularly described in the writ. This is the writ upon which fines were levied at common law. It is said it was also used by termors, who were ousted to recover their terms by virtue of their leases, which are real covenants. But, since the court of Chancery have obliged wrongdoers by ouster to a specific restitution, courts of law have given an *habere facias possessionem* (founded upon the recovery in ejectment, which formerly was a remedy to recover damages only) to recover the term in specie.

The earliest traces I find of the equitable jurisdiction in decreeing agreements, is in a case stated in the year-book of 8 E. 4. 4 b. where it is said by *Genney* "that if I promise to build you a house, and do not perform

10 H. 6. 13.
Fitz. Nat. Brev.
343.

Fitz. Nat. Brev.
655, 556.

Fitz. Abr. tit.
Subj. cov. Pl. 7.

perform my * promise, you have your subpœna," which lies for non-performance of a promise; for a promise there amounts to a covenant. And *Fineux*, Chief Justice, in the 21 Hen. 7. speaking upon the different remedies given in the courts for non-performance of contracts, observes, " that if a man bargain with another that he shall have his land for 10l. and that he will make him an estate therein by such a day, and he do not make the estate, an action upon the case lies, but it is to be observed, *in that* he shall only recover damages; but, by subpœna, the chancellor may compel him to execute the estate, or imprison him. So that the jurisdiction of the court of Chancery in these cases, is clearly deducible from about this period:

However, notwithstanding these early instances of an acknowledgment of this branch of the equitable jurisdiction appear in our books, yet the authority of that court, in decreeing a specific performance of promises, on breach of which a remedy might have been had in damages at common law, was much questioned so late as the 14th of *James* the First; for, in the case of *Bromage* and *Jenning*, wherein the former sued in the marches of *Wales* against the * latter, for not making a lease according to his bargain, a prohibition was prayed in the King's Bench; because an action upon the case lay at common law. And it was said by *Coke*, *Doderidge*, and *Haughton*, that, without doubt, a court of equity ought not to enforce the making the lease; for if it might, to what purpose was the action on the case, or of covenant? And *Coke* said, that this would subvert the intent of the covenantor, who meant to have an election either to pay damages, or make a lease; whereas this was to compel him to make a lease against his will: And a prohibition was granted.

However, the law seems to have been settled in favor of the jurisdiction of courts of equity to decree the specific performance of agreements soon afterwards: For, in *Molineux's* case, which arose in the second of *Charles* the Second, such suits were said to be common in courts of equity.

In that case, A. promised in consideration of, &c. to make assurance of certain lands to M. which assurance A. afterwards refused to make, whereupon M. sued him in the court of Requests to have a specific

G g

performance

[* 5.]

21 H. 7. 41.
Bro. tit. Ac.
Ca. 72.

Bromage v.
Jenning 1 Roll
Rep. 354. 368.
[* 5.]

Molineux's
case, Latch.
172 See Noy
88.

[*7.] performance of * the promise. One cause alledged, on motion for a prohibition, was, that an action upon the case lay at common law : But it was answered, that, though no suit lay at common law to acquire the thing itself, yet that such suit was common in a court of equity. But *Jones* said, that such suit could not be instituted in a court of Requests, although it might be instituted in Chancery. However, the court refused to grant a prohibition, because the plaintiff could not sue at common law to assure white acre, but only to recover damages.

And, on the abolition of the court of Requests, by the statute 16 Car. 1. c. 10. the jurisdiction in these cases was left in the possession of the courts of equity, who, alone, can now decree a specific execution of agreements.

*Penn v. Lord
Baltimore,
a Vez, 447.*

The law was so laid down by Lord *Hardwicke*, in the case of *Penn and Lord Baltimore* ; which was a bill founded upon articles, executed under seal in *England*, for mutual considerations respecting lands in *America*.

Ibid.

[*3.] In delivering judgment in the last-mentioned case, Lord *Hardwicke* said, that there * were several cases wherein collaterally, and by reason of the contract of the parties, matters, originally out of the jurisdiction of the court of Chancery, might be brought within it. Suppose there was an order of the king and council in a cause wherein the king and council had original jurisdiction, and the parties entered into an agreement under hand and seal for performance thereof. A bill must be brought in the court of Chancery for a specific performance. The reason, was, because none but a court of equity could decree that. The king in council was the proper judge of the original right, and whether the agreement was fairly entered into and signed. The king in council might look on that, and allow it as evidence of the original right, but if that agreement was disputed, it was *impossible* for the king in council to decree it *as an agreement*. That court could not decree *in personam* in *England*, unless in certain criminal matters, being restrained therefrom by the statute 16 Car. 1. cap. 10.

This equitable interposition extends to all cases, where either the subject agreed about, or the person contracting, are within the jurisdiction of the court ;
which

which acts in *personam*,* as well as *in rem*, whenever the conscience of the party is bound. Indeed, the primary decree in the court of Chancery, as a court of equity, was in *personam*, and it was not settled, until long after its first institution, that the court could issue process to put parties into possession in a suit of lands. That practice was first begun and settled in the time of James the First, and has ever since been done by injunction or writ to the sheriff. Therefore, though a court of equity cannot enforce its decree as to the possession of lands in *Ireland*, or the Plantations, yet, if the persons be within its jurisdiction, it may properly decree a contract or an agreement to be specifically carried into execution, if there be a foundation for it.

Thus the court of Chancery, in the time when Lord King presided there, made a decree on a suit for lands and a house in *Philadelphia*, although it could not be enforced *in rem*. So Lord Hardwicke, in Lord Anglesey's case, made a decree for distinguishing and settling the parts of an estate in *Ireland*, although it was impossible for the court to enforce that decree *in rem*; because the court could enforce it by process of contempt in* *personam* and sequestration; which is the proper process of the court. And upon the same principle Lord Hardwicke, in Lord Baltimore's case, decreed a specific performance of articles executed in *England*, concerning the boundaries of the provinces of *Pennsylvania* and *Maryland* in *America*.

And a court of equity collaterally, and in consequence of an agreement, judges concerning matters not originally within its jurisdiction. *Ex gratia*, it will retain and decree upon a suit for specific execution of articles of agreement to perform a sentence in the ecclesiastical court, just as a court of law will maintain an action for breach of covenant thereupon.

And a court of Equity will decree any contract that ought, *in foro conscientie*, to be carried specifically into execution. Therefore, if a man be divorced from his wife for adultery, and marry another, and enter into an agreement upon such marriage, a court of equity will decree a specific performance of such an agreement; because it is a marriage according to Christian law; and agreements that are made upon such marriages

[* 9.]

Richardson v.
Hamilton,
1 Vez. 454 Et
vide Toller v.
Carteret,
2 Vern, 494.

[* 10.]
Penn v. Lord
Baltimore,
1 Vez. 444.

Vide 1 Vez.
447, 448.

Gilb. Hist.
Chan. 236, 237.

REMEDY TO ENFORCE AGREEMENTS

[* 11.] ages ought to * be established *in foro conscientia*: For though such marriage be a nullity by the common law, upon political reasons, lest marriages should be dissolved by frequent adulteries; yet, since they are not against the law of God, such agreements upon such marriages are not contrary to natural justice nor *mala in se*, and ought therefore to be established in a court of conscience. Especially as there is a meritorious cause in the agreement, since the woman gives up her person to the man, and likewise her fortune.

Angier v. Angier, Pre. Chan. 96. Gilb. Rep. Eq. 152.

Again; if quarrels happen between husband and wife, and the wife libel in court christian for a separate alimony, and, to quiet this suit, the husband enter into an agreement with a third person to pay the wife so much a year, by way of a separate maintenance; though a court of equity will not decree alimony, because it belongs to the jurisdiction of the ecclesiastical court to enquire into family secrets, yet it will decree a specific execution of this agreement of the husband; Because he ought in conscience to perform it, and no other court has a proper jurisdiction to decree such agreement.

[* 12.]

Taylor v. Wheeler, 2 Vern. 564. Et vide 2 Vcz. 633.

* And copyhold estates are liable to agreements and trusts, in the same manner as freeholds are; and therefore, notwithstanding it has been urged that, if contracts for copyholds were decreed, the lords would be defrauded of their fines, courts of equity have frequently determined, that, if a copyholder enters into an agreement for a sale of his lands, and dies before surrender, or makes a surrender, and dies before presentment (which makes the surrender void) the contract should, if for a valuable consideration, be carried into specific performance against the heir, or voluntary claimant standing in the place of the copyholder. It was so done in the case of *Taylor and Wheeler*, which underwent great consideration. There W. being seised of a copyhold estate, having borrowed money on mortgage, surrendered the estate into the hands of two customary tenants. Several years passed, but no care was taken to get the surrender presented; and, in the mean time, the mortgagor became a bankrupt, and died intestate and insolvent. And, on a bill brought against the assignees and the heir to be relieved, and to supply the defect of the surrender, it not being presented in time; the court decreed that the surrender should

* should be supplied, considering the mortgagee as in the nature of a purchaser by a defective conveyance, which a court of equity will supply as against the vendor, and all claiming under him. [* 13.]

* OF THE EQUITABLE JURISDICTION IN DECREETING EXECUTORY CONTRACTS AND AGREEMENTS. [* 14.]

THIS part of the jurisdiction of a court of equity is discretionary, not only in cases where there is an election of two remedies, *viz.* by applying to a court of equity for a specific performance, or by action at law, as in the common cases of covenants; but also in cases where there is no remedy on the agreement at law, so that unless a court of equity will carry it into execution, it cannot be enforced at all. Of this nature are cases where the whole agreement arises under the acts of the court itself, from orders amounting to decrees; as a judicial sale of an estate, or a purchase before the master: And, therefore, whether there be other remedy or not, still courts of equity refuse to interfere, if there be strong and material objections to the carrying such contract into execution; whether these objections be such as they were not aware

[* 15.] ware of at * the time of such order made, or arising from subsequent events and alteration of rights thereby.

Attorney General v. Day,
supra.

Upon these grounds it was that the court, in the case of the Attorney General and *Day*, refused to decree a specific execution of an agreement founded upon an order made on a master's report, and a decree thereupon for the judicial sale of an estate to the trustees of a charity; namely, First, That to decree a purchase of the lands conveyed to the charity to be made with the money devised to it, would be contrary to the true intent and principle of the mortmain act, and make a great opening to evade it: For, by that means, a person knowing that if he died within a year after the conveyance, the statute would make it void, might give the exact value thereof in money the same way, and, then, the one to be laid out in purchase of the other; which matter, had it been fully entered into at the making of that order, as it was at the time of the then application, would have prevented its being made; but it passed *sub silentio* then, the parties agreeing, and the objections not having been laid before the court. Secondly, Because it could not, from subsequent events, be executed entirely; for, on the death * of W. his part was gone over to his issue in tail, an infant, against whom the court could not decree then, nor could they if he had been of full age; because the court had no jurisdiction to enforce such an agreement against the issue in tail, although it might have enforced it against the tenant in tail. And then, although a private person might have elected to have had it executed in part, yet in this case, it should not be executed at all, the court being to judge for the charity; and it not being for their benefit to purchase the undivided moiety of an estate, such a tenure being inconvenient and entangled.

[* 16.]

It has been observed, that, unless in particular instances which furnish exceptions to the general rule, the court will not decree a specific execution of an agreement on a bill, whereupon damages would not be recovered at law on an action: One instance of an exception to this rule, was put by Lord *Macklesfield*, in the case of *Cannel* and *Buckle*, namely, that of a covenant of a feme, being an infant, to convey her inheritance on marriage to her husband, in consideration of an adequate settlement.

Vide supra. Et
Sel. Ca. Chan.
67, 68.

Cannel v. *Buckle*,
1 P. Will.
243. Supra.

The

* The true ground of distinction seems to be this ; such agreements, whereupon an action at law cannot be maintained by reason merely of a *formal defect* of the instrument, will be carried into execution in Chancery. But that court will rarely enforce such agreements, whereupon an action cannot be maintained, by reason of *events* not happening as provided for by the parties, the absence of which render the agreement ineffectual at law, because the same construction must be made on an agreement in equity as at law.

[* 17.]

The before-mentioned case of *Cannel and Buckle* furnishes an instance of the former kind, and that of *Whitnel* and *Farrel* is an instance of the latter kind. There A. having at the time of his marriage, an estate of 300*l. per annum* in possession, and a leasehold estate, out of both of which he could make a provision for a wife; and having also an estate tail in other hereditaments after the jointure of his mother determined, settled 500*l.* part of his wife's portion, in trust for her and the issue of the marriage; and also settled the leasehold for the benefit of the wife for life in bar of dower, not carrying this over to the issue; he then took up the consideration of an additional * portion of the wife paid by her father, and covenanted that, within six months after the death of his mother, and his coming to be in possession of the estate so in jointure, he, his heirs and assigns, should settle so much thereof as amounted to 100*l. per annum*, for every 1000*l.* the might in future have, upon her for life, then to the issue of the marriage, and for want of such issue, to his heirs; A. died in his mother's life-time leaving no issue, and the estate came to his sister: And upon a bill preferred against her, after the death of the mother, to compel her to execute this covenant in specie, Lord *Hardwicke* was of opinion, that the widow was not entitled to such decree; because no action could have been brought upon this covenant at law, there being two contingencies, upon which the obligation to perform it was to arise; namely, the mother's death, and his being in possession, and one of them only had happened; for, though the mother was dead, the son never came into possession. Now, his lordship said that in an action of covenant against the heir at law or executor, it must have been alledged, in order to assign a breach, that he came into possession after the moth-

Supra.

Whitnel v.

Farrel, 1 Vez,
256.

[* 18.]

[* 19.] er's death ; and as that could not be done, no action could be maintained. * Then there were few cases in which a court of equity would decree a performance of a covenant or agreement upon which, according to the words of the articles, and the events that had happened, there could be no action at law ; for, when the instrument was regularly drawn, the court of Chancery could not put a construction upon such an agreement different from what a court of law would ; and his lordship (though he observed that the case was not clear of doubt) dismissed the bill, so far as it sought a specific performance.

He that exhibits a bill for a specific performance of a contract or agreement, must, in order to entitle himself to the aid of the court, shew that he has performed all that was contracted to be done on his part, or that he is ready so to do ; because it is a rule of equity, in contracts and agreements, that they must be decreed to be performed on both sides *and entirely or not at all*. And, therefore, if it has by subsequent events become impossible for a plaintiff to perform his part of the agreement, at the time of exhibiting his bill, he cannot be entitled to a specific performance of that contract, which he is himself incapable to execute specifically.

[* 20.]
Powell v. Pil-
lett, Gilb. Eq.
Rep. 188. Et
vide Butcher v.
Hintoa et
Short, 1 Chan.
Ca. 302. Et
1 Vez. 87.
Et vide S. L.
Skin, 287.

* Therefore where A. agreed to pay B. 200*l.* within two years, on condition that B. married his daughter, and settled 600*l.* upon her for a jointure, to be laid out in land : and the marriage was had, and there was issue a daughter, but both the mother and daughter died before the two years expired : It was contended, on a bill preferred against A. for a specific execution, that A. ought to perform this contract ; for that B. had married his daughter, and had been looking out for a purchase, and it was the act of God only that had prevented his executing his part of the contract. But the court said that it was in B's power to have entitled himself to the 200*l.* when he had pleased by laying out the 600*l.* which, not having done, he had not entitled himself to a performance in specie by the other party ; therefore the bill was dismissed with costs.

Lord Fever-
ham v. Wat-
son, Finch 445.
2 Freem 35.
Skin, 287.

So, where Lord *Feverham*, by his marriage agreement, contracted to settle 2000*l.* a year on his wife in this manner, *viz.* by settling the manor of H. &c. worth about 1100*l.* *per annum*, on his wife, and the heirs of their bodies, and settling some pensions, and buying such other estates with the money received by the

the * sale, as would make up the jointure 2000*l. per annum* as agreed upon; in consideration whereof the wife's father agreed to settle 3000*l. per annum* on his lordship for life, remainder, &c. Lord *Feverſham* settled the manor, &c. but, before he had sold the pensions, or made the further provision, his lady died without issue. Then his lordship preferred his bill to have the 3000*l.* settled on him during his life; but the court refused so to decree: Because Lord *Feverſham* had not performed the whole of his agreement, and the other part was then become impossible; and, as it admitted of no compensation, he had no title in equity to have performance of his father-in-law's part of the agreement, since he could not perform his own part of it.

In this respect the practice of courts of equity agrees with that of courts of law; for the latter require, that where an action of assumpsit is brought upon, or an action upon a covenant in, an agreement, wherein the second thing to be done, and for not doing of which the action is brought, is *in consideration of something to be done first*; the person bringing the action should shew, if the thing to be done by him be such as he can perform without the * interference of the other contracting party, that he has done the first thing; or, if it be of such a nature that it cannot be done without the concurrence of the other contracting party, that he is ready, and has a right, at the time of bringing the action, to do it.

But, in these cases, a distinction is made in equity (the office of which is to relieve against difficulties arising from unavoidable accidents) where that party, who has performed part of his agreement, and is in no *default* for not performing the residue, is in *statu quo*; that is, is not under any disadvantage from what he has done (as was the case of * Lord *Feverſham* before-mentioned, who, by the death of his wife without issue, was in seisin of his estate in the same predicament as before the marriage) and where he is not in *statu quo*; for, in the latter case, he shall have a specific execution of the agreement from the other party.

† Thus, where a vessel was let to freight to the *East India Company* by charter-party, to go from port to port, and to any port within the limits of their charter, but was to be dispatched for *England* on or before the 24th of *January* 1684, or so soon after as to

H h

have

[* 21.]

Vide *Shelbourne v. Stapleton*, 8 Mod. 292. S. C. 3 Brown Par. Ca. 89. *Luxton v. Robinson*, Dougl. 620. But note the distinction

[* 22.] where there are mutual covenants, and not a stipulation to do one thing in consideration of another done; for if there be, then each of the parties may maintain his action without alledging the performance on his part, because if one covenants to do one thing, and another to do another thing, each of them may have his mutual action.

* Supra.

† *Edwin et al. v. East India company*, 2 Vern. 210.

[* 23.]

* save her monsoon for *England*; or, in default thereof, the owners were to pay four months demurrage at 7*l.* 10*s.* a day, for her monsoon so lost, and her stay in *India* after the 24th of *January* 1684; with this further clause, that the company might detain the ship in their employment for any longer time, not exceeding twelve months, after the rate of 7*l.* 10*s.* 6*d.* a day demurrage, until dispatched from the last lading port, or expiration of the twelve months, which should first happen; but, after that time, the ship was to return to *England*, and the company not to be subject to any farther demurrage, or any damage that might accrue by her detention: And the company covenanted therein, on the ship's arrival in *England* again, to pay freight for three hundred and one ton, and demurrage from the 20th of *January* 1684, until the ship should be dispatched, for the space of twelve months after that day.

And it was thereby provided, that, *until six days after the ship should have returned to the port of London, and made a right and full discharge of all her lading*, the company was not to pay, nor to be liable to pay any of the sums of money agreed on for freight or demurrage, or for detaining the ship in *India*; it being the intent of

[* 24.]

* the parties, that, if the ship should be lost either in her outward or homeward bound voyage, nothing should be paid by the company for freight or demurrage. The ship was employed in the company's service, so that she arrived not at *Surat* until 1686, which was a year beyond the time stipulated for the company's using her. She was from thence ordered to *Bombay*, where the ship, having been so long detained in those seas, was surveyed, and found not sufficient for a voyage to *England*; and in consequence thereof the seamen were discharged, and the ship left there. The company refused to pay any thing for freight or demurrage, because, by the express provision of the charter-party, they were not to pay until six days after the ship's arrival in *England*, and being discharged of her lading; and they said, that if they were to pay any thing, yet, they were to be charged with demurrage, until *March* the 23d, 1685 only, and no longer, according to the provision in the charter-party: They likewise refused to account for the value of the ship, or to shew how they had disposed of her. But on a bill filed for relief, it was said, *per curiam*, that though the charter-party

was so penned that nothing could be recovered at * law, yet the owners had a just demand, and ought to be relieved in equity. And it was decreed accordingly, that the company should account for what they had made of the ship; that they should pay demurrage according to the rate mentioned in the charter-party; and that they should also be charged in respect of freight, according to the quantities of the respective commodities which were usually brought home on such a voyage by such a ship, and their proportions to each other.

And in the last mentioned case the court cited the case of *Westland and Robinson*, where, as in most cases, there was to be no freight paid for the outward bound cargo, but only a certain rate *per ton* for the homeward bound cargo, and, when the ship arrived beyond sea, the factor had no goods at all to load it with, so that the ship was forced to come home in ballast; and yet the court of Chancery decreed the payment of freight. And so it was said it had been done in a like case, of a ship that was hired at *Newcastle* for a voyage to the Duke of *Courland's* country, where freight was only to be paid for the homeward bound cargo; and, when the ship came there, the goods had been seized and attached, by reason of * which she was forced to come home empty: Yet, in that case, the freight was decreed.

* And, upon the same principle, if a man has contracted for a portion with his wife, and has agreed to settle upon the wife and her issue specific lands of such a value free from incumbrances, and has sold part of his land to disincumber and settle the rest, he shall, if the wife die without issue before the settlement be actually made, have the portion notwithstanding; because he, *having sold part of his lands*, cannot be put in *STATU QUO*; and there was no default in him, since he was going on to disincumber and settle the rest: Therefore the death of his wife will not, in equity alter his right to his wife's portion.

There is also a difference between carrying into execution agreements on marriage, and other agreements; for, though all other agreements are considered as intire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed against the other in specie, but must be left to an action at law; in marriage agreements it is otherwise: Because, although

[* 25.]
pany, *vid.*
Doug. Rep.
277.
Lord Mansfield
said: in construing agreements, I know no difference between a court of law and a court of equity; a court of equity cannot make an agreement for the parties, it can only explain what their true meaning was, and that is also the duty of a court of law.
And upon that ground the court has decided, that circumstances similar in some degree to those

[* 26.]
in the principal case here cited, would excuse the owners in an action on the charter-party, from shewing a strict performance of their part: of the agreement; upon the ground that, upon the fair construction of the charter-party, it had been performed according to the true meaning of the parties.

* *Meredith v. Wynne.* Gilb. Eq. Rep. 70. Pic. Chan. 312. 1 Eq. Ca. Abr. 70.

[* 27.]

although either the relations of the husband or wife should fail in the performance * of their part, the children, nevertheless, may compel a performance by the other party. As if the wife's father, for instance, had agreed to give a portion, and the husband's father had agreed to make a settlement, here, although the wife's father should not give the portion, yet, the children may compel a settlement; because non-performance on one part, shall be no impediment to the children's receiving the full benefit of the settlement. So, if there be a failure on the part of the father's relations, the consequence will be the same; all the court can do in such cases is, to lay hold of such estate as the husband may claim towards making good his proportion of the settlement. The reason of this distinction between marriage agreements and others is, that the children considered as purchasers, are intitled to *all* the benefit of *the uses* under the settlement, notwithstanding there has been a failure on one side.

Supra 20.

[* 28.]

Upon this principle it was admitted in *Lord Feversham's* case, that, if there had been issue of the marriage, they would have been entitled to have been relieved against the accident of the mother's death, by which their father was rendered unable to perform part of * what he had contracted for, and to have had the 3000*l.* a year settled upon them by their grandfather.

The same principle extends to the case of the wife, under such articles, if she be not a party contracting for payment of her portion.

Perkins v. Lady Thornton,
cited 1 *Vez.*
377, 378.

Therefore where A. in consideration of 1000*l.* was, by articles, to which the intended wife was not a party, to settle a jointure on his wife; and the marriage was had, but the portion was not paid: On a bill by her to have the jointure, it was decreed to her; for, she was not a party, but was only to perform by marrying; and, therefore, was entitled to her jointure, on the faith of which provision being made her, she had married.

But this exception extends only to cases, where such contracting party is not to receive any benefit from the other side, or to take any advantage to themselves: Thus, if the wife, in the preceding case, had contracted to pay the portion, the court would not have decreed her to have had the settlement if she had not paid the portion;

portion; unless * it could have been put in such a shape, as that the husband could have had the benefit of the articles; for, then, the court would certainly have decreed it.

[* 29.]

Thus where, previous to the marriage of A. articles were entered into, by which he agreed to settle an estate in *Ireland* first, on his intended wife (who was then under age) for a jointure, and then, subject to a provision for younger children, on the first and other sons in tail; and that the wife's fortune should remain in the hands of trustees, until the conveyances or settlement thereby intended should be executed. And it was also agreed, that it was the intent that, to enable A. to execute the same conveyances and settlement, the wife's portion should be applied to the discharge of the incumbrances affecting the estate, and the overplus be paid to A. his executors and administrators. The marriage was had, but no settlement was made. The husband afterwards went abroad, and there died. Then the wife preferred her bill against the executors of her father and her children, for the payment of the residue of her father's personal estate, as the right thereto survived to her, upon her husband's death. No estate * in *Ireland* appeared, and it was admitted on all sides that no settlement could now be made; but the defendants, the children of the marriage, insisted that they were purchasers under these articles, as an agreement by the mother for the disposal of her estate, which was binding; suggesting, that they were equally entitled with the mother to have the benefit of it, although no settlement had been made; and that the court should decree an equivalent to them, or that an equitable apportionment should be found out, this being a losing bargain, and both parties purchasers. But Lord *Hardwicke* was of opinion, that the children, under these circumstances, were not entitled; and that no court of justice could take this portion out of the hands of the mother or her trustees, who were the representatives of her father, unless she had that part of the settlement, agreed for her benefit, made good to her; for, the loss arose from the fraud and misbehaviour of the father of the children. The mother had as good an equity as themselves, and had the law on her side, having a right to sue in the ecclesiastical court, which was the law of the land in this case; then they were all purchasers

Pyke v. Pyke,
1 Vez. 376.

[* 30.]

chafers

[* 31.]

chasers in equal degree, and the children had not a right to * come against the mother, to make good the failure on the part of the father. The agreement was only that the wife's fortune should remain in trustees, till a settlement should be made in pursuance of it, which settlement was to be of the husband's estate, and her portion was to pay off the incumbrances thereon; but no such estate had appeared. Then, if no such estate could be found, there could be no specific performance.

And, where the one party to an agreement has performed all that is requisite on his side, and, before the time at which the other side is to perform his part of the agreement, the legislature interfere, and render a performance on his side as to part illegal; a court of equity ought, notwithstanding the beforementioned rule, to decree the other part to be performed *in specie*.

Dr. Bettel-
worth v. Dean
and Chapter of
St. Paul's, Sel.
Ca. Ch. 66. 3.
Bro. Ca. Par.
339.

[* 32.]

This question occurred in the case of Dr. *Bettelworth* and the Dean and Chapter of St. *Paul's*, and was decided in the house of Lords in favour of a part-performance, on an appeal from a decree of the court of Chancery. The point arose on a lease made by the dean and chapter of St. *Paul's*, to the master and * fellows of *Trinity college* in *Cambridge* (in trust for *Doctors Commons*) of the land on which *Doctors Commons* is built, for ninety-nine years, to commence after the expiration of a lease then in being, under a rent of 5*l.* and the doctors giving their advice to the dean and chapter *gratis*, and new building the houses and residence of the doctors there. And in the lease there was a covenant for renewal for ninety-nine years, on surrender of the old lease and payment of 20*l.* in which future renewed lease there was to be the like covenant of renewal on surrender, *toties quoties*. The statute of 13th and 14th Elizabeth was then passed, by which ecclesiastical bodies were restrained from making leases in corporations or market towns, for any greater term than forty years. The lease being near expiring, a bill was filed in the court of Chancery, on behalf of *Doctors Commons*, to oblige the master and fellows of *Trinity Hall* in *Cambridge*, to surrender up the lease to the dean and chapter of St. *Paul's* and to procure a lease from them for forty years in trust, with the same covenants as in the former lease. And it was contended against the renewal, that this was an entire cove-
nant,

nant, and could not be apportioned, and then, the act of * parliament intervening was a release of it. And so it was held to be by Mr. Justice *Price* and Lord Chief Justice *Raymond*, against the opinion of the master of the Rolls, and thereupon the bill dismissed. But this decree of dismissal was reversed, on appeal to the house of Lords, upon the opinion of the judges *seriatim*; and the dean and chapter ordered and adjudged to make a lease for forty years under the ancient rent, with a covenant and conditions as in the old lease contained, except the covenant for renewal.

[* 33.]

So, if the entire performance of an agreement for a purchase be prevented by accident, or the act of God, yet, if the vendee is satisfied with a part performance, the better opinion seems to be, that the court would decree it. And, therefore, although, if one enter into an agreement for a purchase of lands of tenants in common in tail, and one of them die, and then the other institute a suit for an execution as to a moiety, the court would not execute it against the purchaser; because what is required is different from what was contracted for, and the purchaser's meaning might be to have the entire estate; and the court pretends to decree in specie only, which the decreeing * half would not be. Yet, if the purchaser, on the death of one of the tenants in common, who has contracted for a sale of the estate, should bring a bill against the survivor, desiring to take a moiety of the estate only; the interest in the money being divided by the interest in the estate, he might have a specific performance as to a moiety decreed him from the survivor, although the contract could not be executed against the issue of the other.

[* 34.]

The court of Chancery will not compel a purchaser under a decree, or by agreement, to complete the purchase, if there be any substantial doubts as to the goodness of the title of the vendor. And, therefore, where there were the opinions of learned men against a title to an estate, sold before the master under a decree of the court of Chancery; the master of the Rolls would not compel the purchaser to accept the purchase.

Vide *Marlow v. Smith*, 2. P. Will, 199.

But this court will not suffer a party to defend himself against executing his agreement in specie, upon pretence of some formal matter being requisite to complete the title, where that circumstance is supplied by other matter that makes it equally secure.

Therefore,

[* 35.]
 Cotton v. Will-
 son, 3. P. Will.
 130.

* Therefore, where one, being in debt, and entitled to the equity of redemption of an estate mortgaged nearly to the value, devised it to his youngest brother, and to his brother-in-law, and their heirs, in trust to sell, and pay debts and legacies, and to pay the remainder of the purchase money, if any, to the testator's eldest brother, who was beyond sea in the service of the *India* company, and died; and the trustees entered into an agreement for the sale, and then the creditors filed their bill against the vendee, under the agreement to complete his purchase, &c. : The vendee, admitting the agreement, and that the will had been proved in the court of Chancery, objected, that the heir, who was beyond sea, though made a defendant, had not appeared or answered the bill, and said, that though he was at first willing to purchase the estate, and had entered on good part thereof, yet, the other part on which he had not entered being out of repair, the tenant racked, and the rents likely to fall, he was now desirous to be discharged of his purchase. And it was argued that he ought so to be, this being a case founded upon a will not proved in equity against the heir, and therefore a defective title; because none of the depositions of the * witnesses that had been examined for the will could be read against the heir, and, therefore, he might lie by till they were dead, when he might contest it. But the chancellor, though he admitted that it was proper that a will disposing of lands should be proved in equity, especially in case of a modern will, yet observed that he could not say this was absolutely necessary to make out the title, any more than it would be to prove a deed in equity, by which an estate should be settled from the heir at law after the ancestor's death, which would certainly be no ground to object to a title. The will prevented and broke the descent to the heir as much as a deed, and the hands of the witnesses to a will might be as well proved in one case as in the other. Besides, his lordship observed, that the vendee knew the fact of the heir's being beyond sea at the time he entered into the agreement, and yet had not required his joining, or the will's being proved against him; but had admitted by his answer, that the will was duly executed, and had, by entering on part of the estate, executed the purchase. His lordship therefore decreed that it should be completed.

Note. This decree was on a rehearing the former decree having discharged the purchaser from his purchase.
 Reg. lib. A.
 1732. fol. 574.

The

* The reporter observes upon the preceding case, [* 37.] that it was a great help to the title that the mortgage, made by the testator, and prior to the will, was for the greatest part of the purchase money, and must be kept on foot for the protection of the title.

And a probable certainty of a good title, is a sufficient ground for the court to found a decree for specific performance of an agreement for a purchase upon; for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title. Therefore, it has been held, not to be an objection to a title, that it is derived under a grant from the crown, in which there is a reservation of tin, lead, and all royal mines within the lands; because, although grants from the crown have, for the most part, such a general reservation, yet, there is no instance, where the crown has had only a bare reservation of royal mines without any right of entry, that it can grant a licence to any person to come upon another man's estate and search for such mines; nor has the crown any such power, neither is it warranted by the royal prerogative of mines: for it would be very prejudicial if the crown could enter into the ^{the} subject's lands, or grant a licence to work their mines unopened. But, when they are once opened, the crown can restrain the subject from working them, and can either work them itself, or grant a licence for others to work them.

Neither are suggestions of there being old entails, or doubts what issue persons have left, whether more or fewer objections of that force as to overturn a title to an estate. Ibid.

The principle, upon which courts of equity decree an agreement or articles to be performed, seems to be; that the purchaser has, by the contract, an equity to recover the land, and the vendor is thenceforward a trustee for the purchaser, or whom he shall appoint, till a conveyance executed.

In all cases of covenants, the court of Chancery, on application to have them decreed in specie, consider what was the intention of the parties covenanting; and, if that was, that the parties should rely and depend upon the security of the covenant only, equity will not alter the security agreed to be accepted of, or vary the remedy: For that would be going
I i beyond,

Vide Lyddal,
v. Weston, 2
Atk. 19, 20.

[* 38.]

[* 39.]

Earl of War-
ington v. Sir
James Lang-
ham, Pre. Ch.
39 Et 1 P.
Will. 107. Et
vide Colmer
v. Colmer,
Mofely 118.
Colles's Par.
Ca. 149.

beyond, * and, consequently, against the intent of the parties.

Therefore where A. on his daughter's marriage, covenanted to leave her 1000*l.* to be paid within six months after his death : and his grandson, her representative, filed a bill, praying that A. the grandfather might give security for a performance of this agreement : The court refused to make such a decree, because the daughter and her husband had agreed to accept of the covenant, and equity would not alter the contract of the parties.

Collins v.
Plummer,
2 Vern. 635.
S.C. 1 P. Will.
104. Et vide
Whitworth
v. Hallet,
Mofely 96.
Colmer v. Col-
mer, et al, ibid.
118, 121.

So where a settlement was made on the husband for life, remainder on his intended wife for life, remainder on the heirs of the body of the husband on the body of the wife, remainder to his own right heirs, with a covenant by the husband, that he would not dock the entail, or suffer a common recovery ; and the husband, having only one daughter married to C. suffered a recovery, and devised his estate to his daughter for life, remainder to her first and other sons in tail, remainder to his own nephews ; provided, that if his daughter survived her husband, she should have the estate in fee : The court, on a bill * filed for that purpose, refused to decree a specific execution ; because it was evident from the covenant, that the parties knew the husband had power to bar the estate, and yet agreed to accept of a covenant, by which they might recover damages, and not the thing in specie ; and then to have decreed the latter, would have been going beyond the agreement.

[* 40.]

Bosvil v. Bran-
der, 1 P. Will.
461. Sed vide
5 Bro. Par Ca.
208. Where no
election, et
note the dis-
tinction. Et
vide Blaiker v.
Mathers, 5 Bro.
Par. Ca. 510.
Where, on a
general agree-
ment for a
lease, the house
of Lords held
the landlord
bound to grant
one, without
inserting re-
strictive clauses
of an unusual
nature.

So where A. by articles entered into before marriage, covenanted to settle on his wife the manor of *Dale*, or, to leave her 1000*l.* to be paid within three months after his death ; the court of Chancery would not, on a bill, exhibited by her, compel A. to do the one or the other, or to give any further or better security for the payment of the 1000*l.* : Because, by the agreement, he had his election all his lifetime, and she had that security which she at first agreed to take, and which the court will not better contrary to the intention of that agreement.

The intent of the parties to an agreement may be evinced, either from the nature of the covenants compared with the substance of the agreement, as was instanced in the case last put, and also in the preceding one

EXECUTORY CONTRACTS, &c.

one of *Collins* * and *Plummer* ; or, from the nature of the contract on which the covenant or agreement arises, considering who are the parties to it, and the object of their stipulating. The most apt instances of this sort that occur, are in the cases of marriage articles, wherein, although lands are expressly covenanted to be conveyed to one for life, with remainder to his heirs male of his body, which, on a contract executed, would give A. an estate tail ; yet, on a bill brought for the execution of articles, the lands will be directed to be settled upon A. for life, with remainder in *strict* settlement upon his first and other sons in tail male, &c. : Because, from the nature of the contract it is clear, that the issue of the marriage are principally in the consideration of the parties, and that the contract is made with a view to secure to them the estates stipulated about, and of which they are purchasers in consideration of the marriage. It is considered, therefore, that it would be a strange and vain construction of such contracts, if the principal contracting, and who is evidently the person meant to be restrained thereby, should be intended to have such an estate by them, as would enable him the very next day after their execution to defeat, by a fine, the * limitations to his issue, with a view to secure which limitations the contract was entered into, and a valuable consideration paid for it.

And the issue, claiming under such articles, will be entitled to an execution in specie, pursuant to the construction of them as already stated, although a settlement be made thereon ; if the limitations therein do not pursue that form.

The first case decided both upon articles and a settlement before marriage, was that of *Honor* and *Honor* ; which arose on articles to settle an estate on the father for life, remainder to the heirs of the body of the mother by the father, remainder to the father in fee. These articles had been executed by a settlement made before marriage to the father for life, remainder to the mother for life, remainder to the heirs of their two bodies, which gave the father an estate tail ; the settlement was mentioned to have been made pursuant to and recited the articles. And it appearing that the parties did not intend to vary the uses of the articles, and there being proof that a strict settlement was intended, it was decreed, on a bill brought, by the son

[* 41.]

Trevor v. Trevor, 1 P. Will. 622. 1 Eq. C2. Abr. 387 S. C. 2 Brown Ca. Par. 122.
Bale v. Coleman, 1 P. Will. 145. S. C. 2 Vern. 671.
Griffith v. Buckle, 2 Vern. 13.
Osgood v. Stode, 2 P. Will. 257.
Nundicke v. Wilkes, 1 Eq. Ca. Abr. 593. Pl. 5.

[* 42.]

Honor v. Honor, 2 Vern. 658. 1 P. Will. 123. 2 Eq. Ca. Abr. Pl. 1.

[* 43.] of the * marriage, to have them executed in specie, that the estate should be settled pursuant to the articles, by which the father was only to be tenant for life.

West v. Erissey, 2 P. Will. 349. 3 Brown Ca. 1st ar. 327.

So, in the case of *West* and *Erissey*, which arose on a bill to have the benefit of marriage articles; preferred by the grand-daughters of the settler, (who claimed under them by virtue of a limitation in remainder, after two several limitations to the heirs male of the body of their grandfather by his then or any future taken wife) and conceived in the following terms, namely, "remainder to the heirs *female* of the body " of B. by his then intended wife;" which articles had been executed by a settlement, made previous to the marriage but mentioned to have been made in pursuance and performance of the articles, in which this limitation was carried into execution by limiting a remainder "to the heirs of the body of B. by his said wife." B. having issue only a daughter, and being tenant tail by this limitation, suffered a recovery, sold part of the lands, devised the residue, and died. The articles were made in *December*, and the settlement in *March* 1685. The sale of the lands was in 1698, and the will in 1722. The * defendant pleaded the settlement, the recovery, the will, and the long enjoyment; this plea was overruled, but, at the hearing, the bill was dismissed: But on appeal to the Lords this dismissal was reversed, and the lands not sold decreed to be conveyed to the granddaughters and the heirs females of their bodies, with cross remainders to them in tail female.

[* 44.]

But, in a subsequent case, where a daughter claimed under articles wherein, after a limitation therein to the first and other sons of the marriage in tail, remainder to the heirs male of the body of the husband (i. e.) by any wife, a limitation was made to *the heirs of his body* by his said wife; with a clause therein, that if the husband should die without issue male by his said wife, and there should be one daughter she should have 3000l. and, if more than one, they should have 4000l. among them, which portion was to be secured upon some part of the estate. The husband having suffered a recovery, and re-settled the estates on his second marriage, in which settlement part of them were subjected to a trust for raising 3000l. for his daughter by the first wife, in satisfaction of the portion she was entitled to on the first articles; the

Powell v. Price, 2 P. Will. 535. Et vide Burton v. Hastings, Gilb. Eq. Rep. 113. 2 Eq. Ca. Abr. 393.

the court refused to decree * the estate to the daughter by virtue of the articles ; distinguishing this case from that of *West* and *Eriffey*, inasmuch as, in the latter case no portion was provided for the daughter of the first marriage, whereas in this case portions in all events were secured to such daughters ; also in the latter case, after the limitation in the articles to the heirs male of the body of the husband and wife, with the remainder to the heirs male of the body of the husband by any wife, came the remainders to the *heirs female* of the body of the husband by the first wife ; so that the daughters were more immediately in the view and contemplation of the parties in that than in the present case.

But the solid ground upon which the above case is distinguishable from that of *West* and *Eriffey* seems to be the first ; for the argument founded upon the latter ground, appears too nice to be opposed to the substantial principle upon which articles so conceived are carried into execution by strict settlement ; for the first limitation being to the first and other sons of that marriage, and the next limitation to the heirs male of the husband, the latter remainder to the heirs of his body by his then intended wife, must have been meant as * a provision for daughters, or have had no signification at all, since it was not to take effect but in failure of sons.

But, if the settlement in such cases be made before marriage, and be not declared to be in pursuance of the articles, this rule does not apply ; because, until the marriage, all parties are at liberty ; and, therefore, if the settlement differ from the articles, it will be presumed that the alteration arose from a new agreement between them, by which the articles will be controlled : But that reasoning does not apply, where the settlement is expressed to be made in pursuance of the articles.

* And the court, it is to be observed, will not relieve, even in the former cases, if the application be made against a purchaser for a valuable consideration. And, therefore, where the defendant to a bill of this kind was the assignee of a mortgage, and denied notice of the articles or settlement, and insisted on his being a purchaser for a valuable consideration ; Lord *Hardwicke* dismissed the bill, so far as it prayed to be relieved against the mortgage.

Vide *Logg* and *Goldwire*, cited *Ca. T.* *Talbot* 20.

* *Warwick v. Warwick*, 3 *Atk.* 291. Note ; the articles in this case limited the estate to the use of the heir male of the husband in the singular number, which Lord *Hardwicke* seemed to think would create an estate tail in him ; but it was not necessary to determine that

And,

point, and there are very strong grounds in support of a contrary opinion.

[* 47.]
West v. Erissey,
supra.

Powell v. Price
supra.

Vide 2 Vern.
564. 2 Vez. 633.

White v.
Thornburgh.
2 P. Will. 702.
S. C. Pre. Chan.
225 Grb. Rep.
Eq. 107.

[* 48.]

* And, in the case of *West* and *Erissey*, the court observed, that purchasers would not be affected, as the plaintiff *there* prayed satisfaction as to so much of the estate as was sold against the personal assets of the vendor only. So, in the case of *Powell* and *Price*, it was admitted, that if the trustees under the second settlement, or the wife, had had no notice of the articles made on the first marriage, they could not have been affected thereby, in equity, being purchasers without notice.

But articles so circumstanced were decreed to be executed by a strict settlement against the creditors of one bound thereby, although they had got the legal estate; for it is, in their hands, bound by all the equity it was subject to in the hands of their debtor.

Thus, where A. seized in fee of freehold estates, covenanted previous to his marriage, to levy a fine thereof to the use of himself for life, remainder to his wife for life, remainder to the heirs male of his body by his wife, remainder to the heirs of their two bodies, remainder to his own right heirs; there was issue a son and a daughter. A. died before any fine was levied; the son came of age, * borrowed money on bond, and procured C. D. and E. to be his securities, who afterwards paid the same. The son, to countersecure and reimburse them, covenanted to levy a fine to them and their heirs, redeemable on payment of the money lent, and what they should pay as his sureties; and, by his will, devised his lands to them to raise money to pay his debts, and then died without issue, but without having levied a fine. And, on a bill preferred by the sister against the trustees and creditors, to have the estate conveyed according to the intent of the marriage settlement, the trustees insisted that they were honest creditors for great sums of money, and had a security made to them by their testator, on whom the legal estate had descended, there having been no fine levied pursuant to the covenant in the marriage articles; and they suggested that, if there had been a fine levied, their testator would have been tenant in tail, and might have barred as well his own issue, as those in remainder; and that, he having the fee simple of the legal estate, and being tenant in tail of the equitable estate, the deed of covenant to lead the uses of the intended fine (although the fine was not actually levied)

levied) was sufficient in * equity to bar it. And that, [* 49.] although their testator had not levied a fine, yet, they had the legal estate in them by the will : and, having both law and equity on their side, ought to prevail against the daughter, who had only a demand in equity by virtue of the father's marriage agreement. But Lord *Harcourt* considered this deed to be in the nature of articles, which would have been carried into execution, by strict settlement, and therefore decreed the estate to the daughter ; which decree was afterwards affirmed by Lord *Cowper*, but upon different principles.

This rule, respecting the construction of marriage articles, being founded upon the presumed intention of the parties thereto, collected from the nature of the contract and its general object, like every other rule whose basis is laid in presumptions founded on collateral circumstances, yields to positive proof, or to the proof of circumstances furnishing still stronger presumptions, that the intention of the parties was directed to a different object : And, therefore, where it was by marriage articles agreed, that 6000*l.* in the hands of trustees, should be laid out in the purchase of lands, to be settled on the husband for * life, remainder to the wife for life for her jointure, remainder to the first and other sons of the marriage in tail male successively, remainder to the husband in fee ; and the father, by the same articles, covenanted to settle, after his decease, other lands upon the husband and the heirs male of his body, remainder to the heirs of the father ; the husband's father having made a settlement of other lands to the husband, and the heirs male of his body, with remainder to himself in fee. One question was, whether this were a good performance of the agreement ; and if the limitation ought not to have been to the husband for life, remainder in strict settlement and ? Lord *King* was of opinion, that the settlement was a good execution of the agreement ; for that the lands last settled by the father were not meant to be a provision for the children of the marriage, they having been taken care of by the other parts of the articles ; but were meant for the support and provision of the husband : And his lordship said, that the different manner in penning the articles in relation to the trust money, from that as to the lands, (the one being in strict settlement to the first and other sons, &c. the oth-

Chambers v.
Chambers.
Fitzgib. 127.
S. C. 2 Eq. Ca.
Abr. 35. Pl. 4.
S. C. Mosely
333.
[* 50.]

[* 51.]

erto the husband; and the heirs males* of his body generally, without being tied up to the issue of the marriage) plainly shewed, that the parties understood, and had in contemplation, the difference between a strict settlement upon the issue of the marriage, and a general settlement upon the husband, and the heirs male of his body.

Again, if a husband, bound by articles, makes a settlement varying from them, but, afterwards, by will, gives other estates to the heir entitled under the settlement; the heir shall be put to his election, and shall not have a decree for a strict settlement under the articles, but upon the terms of abandoning what he has a claim to under the will.

Streatfield v.
Streatfield,
Rep. T. Talb.
176 et vide
Roberts v.
Kingsby, 1 Vez.
238. et vide
3 P. Will. 722.

Thus where A. the grandfather of B. by articles, previous to his marriage, agreed to settle lands to the use of himself and his intended wife for their lives, and the life of the survivor, remainder to the heirs of his body, &c. which were afterwards executed by a settlement reciting the articles, and limiting an estate tail to himself; there was issue of the marriage a son and two daughters. The father, on the son's marriage, settled other lands, of which he was seised in fee, to the * use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with power to raise a portion for younger children. After the son's death, the father levied a fine of the lands comprized in the first settlement to the use of himself in fee, and then devised part of it to his two daughters; and gave all other of his estates to trustees, in trust for his grandson for life, remainder to his first and other sons in tail male, remainder to his own daughters. Then came this clause, "and his will and meaning further was, and he did thereby authorize and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them, devised, and out of the same to allow and expend so much as they should think fit for the education of his grandson during his minority; and that the trustees should place out at interest such monies arising out of the rents and profits of the said estates, which said monies, with interest arising therefrom, his will was should be paid to his grandson at the age of twenty-one, if he so long-lived; or, in case he died before that age, the same to be paid to his own two daughters, their executors," &c. The settlement being held not to be a proper execution of the articles.

[* 52.]

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* articles, one question was, Whether the general devise should be taken as a satisfaction for what the grandson was entitled to under the articles? Et *per curiam*, if the grandson has a lien upon the lands in the articles, then he may stand to them if he pleases; but when a man takes upon him to devise what he has no power over, as well as that over which he has power, upon a supposition that his will shall be acquiesced under, the court of Chancery compels a devisee, if he will take advantage of the will, to take entirely, but not partially, under it; there being a tacit condition annexed to all devises, that the devisee do not disturb the disposition which the devisor has made. Then, in this case, the estates which the devisor had given his grandson were clearly within his power; he had given them to trustees until his grandson attained twenty-one, and had disposed of them in such a manner as that there could never be any undisposed residue to go to the grandson as heir at law; then surely it was as much in the power of the court to make this bequest thus limited to be a satisfaction, if the party would stand to the will, as in other cases. And the court said, that the grandson, therefore, must have six months after he comes of age to make his* election, whether he would stand to the will or the articles; and if he made his election to stand to the latter, then so much of the other lands devised to him as would amount to the value of the lands comprised in the articles, and which were devised to the testator's daughters, must be conveyed to them in fee. [* 53.]

But it was held, in the preceding, case, that the settlement, made upon the son's marriage, would have been no satisfaction for the estates meant to be limited by the articles; because that deed proceeded upon a consideration quite different from those of the articles, the persons claiming under them being purchasers for a consideration entirely new, the limitations being totally different. It would, therefore, have been absurd to have called that a satisfaction for another thing it had nothing to do with, and to which it was no way relative. [* 54.]

But if such articles be carried into execution by a settlement made after the marriage, and subsequent to the birth of a son, and an estate for life only be limited to him in the settlement, with power to make a jointure, although by the articles the son would have been

Reeves v.
Reeves,
9 Mod. 128.
Et vide Mathews's case,
cited *ibid*.

[* 55.]

tenant in tail of the lands bound thereby, * yet, if such settlement be made with the concurrence of the trustees, being a family settlement, and therefore agreeable to the *substantial* object of the articles, it will be valid as a full execution of the articles; and a court of equity will not set it aside in order to make the son tenant in tail, although he be thereby prevented from incumbering any part of the lands settled, otherwise than as he is thereby enabled.

Wakely v.
Wakely, cited
9 Mod. 130.

* 2 Vcz. 639.
Note. Sir Jos.
Jekyl speaking
of the rule,
“that what
ought to be
done should be
taken as done,”
emphatically
observes, that a
rule so powerful
it is, as to alter
the very nature

[* 56.]
of things, to
make money
land, and, on
the contrary,
to make land
money, 1 Salk.
154. And,
applying it to
the case of
trustees, he
says, that, were
it not for that
rule, it would
be in the power
of trustees, ei-
ther by doing,
or delaying to
do, their duty,
to affect the
right of other
persons. vide 3
P. Will. 215.

† Frederick
v. Frederick,
1 P. Will. 710.
4 Brown's Ca.
Parl. 7.

But where there were such articles and no settle-
ment, but the father by his last will, which he men-
tioned to be in execution of the articles, devised the
estate to his son for life, remainder to his first and eve-
ry other son, &c. in tail male, with remainders over; it
was held that the execution being by last will, without
the consent of the trustees, and without the consent of
the son, who was *then* of age, and by that means de-
prived of the power of making a jointure, or charg-
ing the lands for provision for younger children, the
devise should be set aside.

* Courts of equity, in the construction of executory
contracts or agreements, consider them as executed
from the time of their * being entered into, unless some
other time be appointed for executing them; it being a
principle of those courts, *that where one, for a valuable
consideration, agrees to do a thing, such executory con-
tract is to be taken as done; and, that he who made the
agreement shall not, by neglecting to perform it, be in a
better plight, than if he had fairly and honestly perform-
ed, without delay, what he agreed to.*

† Thus, where A. son of B. being about to marry
an orphan of the city of London, with consent of parents
on both sides, several settlements of real and personal
estates were made by B. thereupon; but, the licence
of the court of aldermen, who are the guardians of the
city orphans, being necessary, they were applied to for
their consent, which they gave *upon* condition that the
settlements should be made with the approbation of
the common serjeant, A. promising and agreeing, and
B. undertaking on his behalf, to take up his freedom
of the city *within one year* next ensuing; of which
agreement an entry was made in the court-books. No
part of this agreement was performed. And A. made
his will and died. His widow then brought her bill to
compel a performance in specie of the agreement, it
having

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* having been entered into for a valuable consideration, namely, that of marriage ; the consequence of which would be, that A's personal estate would become distributable, one third to the widow, another third to the children, and the remaining third only would pass by the will. And it was, after mature consideration, decreed accordingly ; for A. having, upon good consideration, made the agreement to become a freeman, *and having survived the year*, in which he stipulated to carry it into execution, must, in equity, be taken to have been a freeman from the time of the agreement entered into, and his personal estate be distributable accordingly. And this decree was, on an appeal, confirmed by the house of Lords.

[* 57.]

And not only the vendor, but all who come in his place, and take in right of *him*, are bound by his agreement ; as his widow, where the estate is copyhold and she entitled to free bench, that being a branch of, and arising from, the estate of the husband ; or a man's heirs : or his executors ; the latter of whom are bound of course without being named.

Hinton v. Hinton, *supra*.

Vide 1 P. Will.
721. 2 P. Will.
197.

Upon this principle, namely, *that the whole estate is by the agreement parted with in equity* * (courts of equity considering the thing as done *from the time it ought to have been done*, and, consequently, considering the vendor from *thenceforth* as a trustee for the vendee, and all who come in his place as bound thereby) a bond creditor, who has a lien upon all his debtor's lands of which he dies seised, will, if the debtor *article* to convey his estate, lose thereby his right ; for, from the time of the articles executed, it is the estate of another, and not of his debtor.

[* 58.]

And the same rule of equity applies in the case of a creditor by judgment, if it be entered up after articles entered into for sale of the debtor's lands, &c. for a valuable consideration *and the money paid* ; for *the articles* bind the estate in equity, and, therefore, must prevail against the claim of any judgment creditor *mesne* betwixt the articles and the conveyance.

Per Lord Cowper, Peach v. Winchelsea, cited 10 Mod. 468.

But in such case the consideration paid must be *adequate* to the thing purchased ; for if the money paid be but a small sum in respect of the value of the land, the purchaser will not prevail against a *mesne* judgment creditor.

Therefore,

[* 59.]

Finch, et al.
v. Earl of Win-
chelsea, 1 P.
Will, 277. last
edit. et 283.
note 1.

* Therefore, where A. was jointress for her life of certain lands, remainder in tail to B. her husband, remainder over ; and B. entered into an agreement with A. that in case she would make to him a conditional surrender of her estate for life, in order to enable him to charge part of the lands with 6000*l.* after the jointress's death, he would settle the residue, together with the equity of redemption, upon himself for life, remainder to his first and other sons, &c. remainder over ; A. surrendered the lands accordingly ; B. suffered a recovery, charged the estate with the 6000*l.* and died without ever settling the lands pursuant to his agreement, being at his death indebted by bond and judgment : The agreement was decreed in specie by Lord *Harcourt*, and that decree was affirmed in the house of Lords. A question then arose before Lord *Cowper*, Whether the judgment creditors of A. who were puiſne to the agreement, should be paid their debts ? and his lordship decreed that they should ; for A.'s equity to have the agreement performed, was not strong enough to stand in the way of the creditors, who had a legal lien on the estate ; for that if all the creditors of B. should come in and be paid * their debts, the estate to be settled *would be an overvalue* for what A. parted with.

[* 60.]

It is observable, on the preceding case, that Lord *Cowper* said he knew the inducement to the Lords to affirm the decree for a specific execution of the agreement, was the proposal of the plaintiffs in the suit to pay the debts by judgment and bond, though that clause had been left out in the decree below ; which was a strong motive to his lordship to lay hold of this objection of inadequacy of consideration.

But it seems that a mortgagee for a valuable consideration, and without notice, would not be bound by articles of agreement made previous to his mortgage ; because, being a purchaser under a contract executed of a trustee in possession *without notice*, he may plead his mortgage against the intended purchaser, or *cestui-que trust* : For his case is distinguishable from that of a judgment creditor, inasmuch as he lends his money upon the title and credit of the land, and is under no obligation to enquire, while he has no reason for suspicion, whether the mortgagor has previously transferred

* transferred his right to another; and, therefore, [* 61.]
the money attaches upon the land: Besides, a mortgagee has no other remedy, but a judgment creditor may take out execution against the person or the goods of the party giving it, and his judgment is only a general security, not a specific lien upon the land.

Upon this ground, namely, that the property in an estate contracted for is transferred from the time of the articles made; it is held, that the vendee shall be liable, if there be no laches on the part of the vendor in fulfilling his part of the contract, to all contingencies happening to it, in the intermediate space between the agreement and the conveyance.

Thus, where A. on the behalf of B. article'd to purchase, &c. several houses at *Port Royal* in *Jamaica*, by which articles C. covenanted to convey, and A. on behalf of B. covenanted to pay 800*l.* for the purchase; one hundred pounds whereof was afterwards paid in part: and then C. filed a bill for a specific performance of the articles. A. the defendant insisted, that he had not sufficient effects of B's in his hands, and that C. had not made out a good title to the houses, by which means * the agreement had not been performed, and that, pending this suit, the great earthquake happened at *Jamaica*, and the houses in question were entirely destroyed and swallowed up; and that, therefore, this agreement ought not now to be decreed in specie. But the court of Chancery, notwithstanding the estate *pendente lite* was destroyed and gone, decreed a specific execution of the articles: Which decree, it is said, was affirmed in the house of Lords.

But Lord *Apsley*, speaking of this case in that of *Pope* and *Roots*, observed, that it was mis-reported; for that it appeared by the printed cases in the house of Lords, in *December* 1692, that a title was made by C. in *January* 1691, by conveyance executed, and the earthquake did not happen till *July* 1692; that A. admitted he had the 700*l.* in his hands; and that the decree was founded on a good title to the premises having been conveyed to A.

However, although the preceding case, as stated by Lord *Apsley*, does not support *Vernon's* report of it, yet, the general principle seems founded in reason, and

Cass v. Rodela.
2 Vern, 280.

[* 62.]

Brown's Ch.
Ca. 137. in
note.

[* 63.] and is supported by * other authorities equally respectable. For it is clear, that property abstracted from possession, being a moral right, may pass by a bare agreement, and that the vendor's retaining the possession of a thing under contract of sale until a future time, does not prevent the right of property from being instantly transferred to the vendee. The right, and the enjoyment of the right, are two distinct things, as is the contract and its execution. Nothing more is requisite for transferring the right of property but the assent of the proprietor, and that assent has its full effect the moment the contract of sale is made, and divests the vendor of his right of property in favor of the vendee, *unless it be otherwise agreed*. But the enjoyment of the right, which relates to the execution of the contract, may be suspended until the vendor has paid down the money agreed on, or on any other account, and the vendee will not thereby be less the proprietor of the thing sold. In such case the seller, from the time of the bargain made, is, as it were, indebted to the buyer for a thing in kind, and therefore cannot be affected by any accidents arising *without any fault in him*.

[* 64.] * The course of authorities, so far as they go, are agreeable to the principles above stated.

Reeve's Hist.
Comm. Law,
373, 374. Manning's case,
2 P. Will. 411.

Thus, where a man seized of land in *jure uxoris* sold four hundred oaks for 20*l.* and half were taken during the life of the wife, and then she died, and the baron not being tenant by the curtesy, the heir entered, and the husband brought an action of debt for the remaining half of the money (the other half having been paid in the wife's life when the trees were removed;) it was held by the whole court, that the action lay: Because the contract was good at the time of the bargain.

Ibid.
18 Ed. 4, 5.

In like manner it was held, that, should a horse, after being sold, die in the stable of the vendor between the sale and the delivery, the vendor might have debt for the price. It was at the pleasure of the vendor to retain the horse till he was paid the price, and yet he could not have an action of debt till the horse was delivered; the property, however, was in the buyer by the bargain, so that if he tendered the price, and it was refused, he might take the horse, or have detinue for it.

So

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* So where one by articles, reciting that he had an estate in a church lease, covenanted to convey his title to the same by such a day to another, as the covenantee's counsel should advise, and it happened that, after the articles, and before the time appointed for the conveyance, one of the lives dropt; the question was, Upon whom the loss should fall? And it was decreed by the lord keeper, that in regard here *was no default in the seller in making the conveyance*, the loss of the life ought to be borne by the purchaser: Upon the same principle on which it would be held, that if the reversioner had articulated to sell the reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should then have the benefit of it.

[* 65.]
White v. Nutt,
1 P. Will. 61.

And where the bill was to be relieved against a contract in writing, on which a judgment had been obtained, and damages given, and which was for the sale of eleven shares of the Lustring Company, at 58*l.* a share, with the 10*l.* *per cent.* which the company had called in, and which the seller had agreed to pay; the articles were dated the 10th of *August* 1720, and the money was stipulated to be paid on the then next opening of the company's books, * at which time the defendant was to transfer the shares to the plaintiff; the scrivener drew the articles according to these instructions; but at the meeting of the parties in order to seal, the defendant, the seller of the stock, insisted that he would not sell, unless the plaintiff would agree to pay the purchase money at all events at such a day certain, *whether the books did then open or not*; and, the stock being then risen, the plaintiff consented to execute an indorsement on the articles to that purpose; which articles and indorsement were executed at the same time in a tavern: On the 20th of *August*, a *scire facias* issued to repeal the patent granted to this company, and at the same time a proclamation was published to forbid proceeding in transfers; and an act of parliament afterwards passed, making it a premunire to have any dealings with these bubbles; the company remitted the call of 10*l.* *per cent.* and, in lieu thereof, accepted 2*l.* *per cent.* but never afterwards opened their books; nor, as their own secretary deposed, were they ever likely so to do: Although the Master of the Rolls considering it as against natural justice that any one should pay for a bargain that he could not have,
and

Stent v. Bailis,
2 P. Will. 217.

[* 66.]

[* 67.] and that there ought to be a *quid * pro quo*, whereas, in this case, the defendant had sold the plaintiff *a mere bubble or moonshine*, and a thing which it was *impossible* should ever be made good to the plaintiff, it being clear that the company could not justify any more transfers; held, that the money could not be said to be due in conscience, supposing the plaintiff incapable of coming at that which he had contracted for, and in consideration whereof he was to pay his money, and thereupon decreed a perpetual injunction and satisfaction to be entered upon the judgment; yet Lord King, on a re-hearing, recommended the parties to share the loss, and it was agreed accordingly.

Mortimer v.
Capper, Bro.
Rep. Ch. 156.
Et vide Baldwin v. Boulter,
cited *ibid.*

[* 68.] And in the case of *Mortimer and Capper*, where C. contracted to sell M. a piece of ground for 200*l.* and 50*l.* a year annuity to the vendor for life, the vendee to pay M. a mortgage thereupon; and C. was found drowned two days after the contract was reduced into writing; a bill was filed against the heirs at law of C. for a specific performance. The agreement appeared to have been fairly made, with the approbation of C.'s family; but it was objected, that no payment of the annuity having been ever made, the * contract was void. *Sed, per* Lord Chancellor, To decree for you I must lay down as a rule, where a bargain depends upon a contingent event, which chance both the parties know; that, if the chance turns out against one of the parties, he must be discharged from his contract. This contract cannot be impeached on any other ground, than that the annuitant died before payment; that the bargain has turned out all advantageous to one party, which was supposed to have been fortuitous. Enquiry must be made as to the value of an annuity for the life of C. in order to introduce the question, Whether an estate being disposed of for an annuity, which is a contingency, the contract shall fall to the ground if no payment of the annuity shall be made? I think, if the price was fair, the contract ought not to be cut down, merely because the annuity, which is a contingent payment, never became payable.

Supra, 1 P.
Wul. 62.

But *Wright*, Lord Keeper, seemed to be of opinion, in the case of *White and Nutt*, that if, in that instance, all the lives had dropped before the execution of the conveyance, it might have been another consideration; for, that the money *was to be paid upon the conveyance*;

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* *conveyance* : and, as no estate would then have been left, there could have been no conveyance. And Sir *Joseph Jekyl*, Master of the Rolls, put a similar instance in the case of *Stent and Bailis*; for he observed that, if he should buy a house, and, before such time as he, by the articles, was to pay for the same, the house should be burnt down by casualty of fire; he would not in equity be bound to pay for the house, and yet the house might be built up again.

Now it is observable upon the preceding *dicta*, for they amount only to instances put by way of illustration, that the validity of Sir *Joseph Jekyl's* decision, in conformity to the case he here puts, was doubted of by Lord *King*, in consequence of which a compromise took place; and that Sir *Nathaniel Wright* founded his observation on the ground, that the money was *expressly* stipulated to be paid *on the conveyance being made*, but this seems not to be putting the case fairly; for the same observation would have applied with equal force to the case there in question; Because, if the contract be to be viewed in that light, the stipulation was, to convey the estate in the condition which it was in at the time of the *bargain made; and I should apprehend that, to have maintained an action upon a covenant to pay on conveyance *actually* made, it must have been averred, that the vendor had conveyed an estate for three lives, and that the lives were in *esse*. But the true principle seems to be, that, in equity, if the party agreeing to convey have a good title, and be able so to do at the time of the bargain entered into, and be clear from the imputation of delay in performing his part of the agreement, the contract is there considered as *then* executed; the subsequent conveyance being only matter of form, the substance being the bargain. From that instant then the property is changed, and whatever casualties fall thereupon should, it seems, be borne by the new owner. Suppose the money, to be paid for the bargain, be in such a predicament as to be clearly identified; as if it were, by consent of both the parties to the agreement, deposited with a third person in two or three bags, to make good the payment on conveyance made, and any casualty happen to it, as if for instance, one of the bags were stolen; it seems clear that, upon the principle of the case of *White and Nutt*, the vendor must be the loser, for the subject seems immaterial if

[* 69.]

Supra, 2 Will,
220.

[* 70.]

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- [* 71.] * the agreement attaches upon it, and it be bound by the bargain. Suppose the conveyance were made, and the holder of the money refused to deliver it, would not the vendor be the proper person to bring trover for it? for, in consideration of the conveyance made, it is become his money in law; therefore what the actual conveyance effects, at law, the agreement effects in equity. If this reasoning be just, what difference could it make if two bags were lost and the third remaining? it is submitted it could make none; for it is not the quantum of loss that must decide who is to bear it, but the ownership. The *maius* or *minus* must be immaterial. Then, if the whole money were lost, being actually identified and proved to be that bound by the contract, the principle would not be thereby altered. The vendor would be the sufferer. Is it not equal equity then, that, if the lands were lost, the vendee should stand to the damage? This is precisely agreeable to the reasoning of Sir *Nathaniel Wright* in the same case; for he says, the vendee shall take it, though a life be fallen, in like manner as, if the articles had been for sale of a reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should have had the * benefit of that; for, says he, in such case, in equity, the estate is *as conveyed* from the time of the articles sealed. Why then, if that be true, and both lives upon which the reversion was expectant had fallen, the vendee must have had the benefit? because the number of lives falling could not have altered the principle, *that the estate was, in equity, as if conveyed ab initio.*
- [* 72.]

Manning's
case, 2 P. Will.
411.

Lord *Thurlow*, speaking to the defendant's counsel, in the case of *Mortimer and Capper*, says, "to decree for you, it must be laid down as a rule, that where a bargain depends upon a contingent event, which chance both the parties know, if the event turns out against one of the parties, he must be discharged from his contract. Then it is to be impeached upon this ground, namely, that the bargain has turned out all advantageous to one party which was supposed to be fortuitous;" and the Chancellor concludes with saying, "that if the price be fair, the contract ought not to be cut down merely because the annuity, which was a contingent payment, never became payable." Would not the same reasoning have applied to the case of *White and Nutt*, supposing all the lives had died? That bargain

* bargain was for an estate determinable upon the contingency of three lives being exhausted, which chance both the parties knew. Why then should the contingency of all the lives dying in one case vary the contract, more than the contingency of the annuitant's life failing in the other; or, why should the fact of there being no estate to convey at the time of conveyance, in one case, affect the principle more, than the fact of there being no annuity to pay at the time of the conveyance should affect in the other? [* 73.]

But, it may perhaps be said, that there is an evident distinction, not only between a contract for sale of an annuity, and one for sale of an estate for lives, but also between those contracts and a contract for sale of an absolute estate; for the former are, upon the face of them, contracts for contingencies, the latter is not so. I confess such an observation would not furnish in my mind any ground for a distinction. An annuity is determinable by the casualty of the life during which it is payable failing in; an estate for lives is in its nature to cease, when the lives during which it is to continue no longer exist; an absolute estate in lands is also exposed to those convulsions of nature to which the land that is the subject of * it is liable; and a house may be consumed by fire. Every one who treats respecting either of these subjects must be aware of these chances, and being aware of them must be considered as making his bargains with the full knowledge of the possibility of their happening; the only difference seems to be, that some of the casualties are more probable to happen than the others: But all are equally incidental to the several subjects exposed to their influence. [* 74.]

If any distinction can be made in the cases put, it seems to me that it must be in favour of the vendor of the absolute estate in lands swallowed up by an earthquake, or of the house destroyed by fire, and not in favour of the purchaser in consideration of a contingent payment (as of an annuity) whereon, by reason of the death of the annuitant, nothing becomes due; for such a case, it appears to me, might be fairly contended to fall within the distinctions I have before mentioned, where that party who has performed, and by the same reason where that party, who is ready to perform his part of the agreement, is in *statu quo*: As in the cases of *Lord Feversham and Watson*, and of *Powell and Pellet*;

[* 75.] *Pellet* ; because the * seller of the annuity has paid nothing ; he has done nothing towards performance of his part of the agreement ; and it is become impossible, as to part, that he should : The contingent payment never commenced nor can commence, neither does it admit of compensation ; where then is the equity of his case ? If he brought an action upon the agreement, he could shew no real damage ; he could therefore recover only a nominal one. We are to recollect, in considering these kind of cases, that the interposition of the court is discretionary, and the title to demand it, is to be raised on an equity derived from circumstances. That, therefore, although that discretion be not arbitrary, so as for the court to be warranted to deny its interposition where that equity is to be found, yet it is absolutely arbitrary, when all the circumstances of the case do not concentrate to raise that equity. Minute incidents then may, in some cases, turn the balance either way. Nothing can afford a stronger ground to refuse the aid of the court, than that it is impossible for the one party to have a complete performance, and that the other, who seeks for it, is in precisely the same predicament as he was at the time at which he entered into the agreement.

[* 76.] *But the case is different as to the vendor of an estate swallowed up, or house burnt down ; because, had he not been bound by the agreement, he might have sold this property to others, and the conveyances might have been sooner completed ; the parties contracting are not in the situation they were in at the time of the contract made ; it ought therefore, in equity, to be rendered efficacious *ab initio*, thereby to determine on whom the casualty shall fall. If, after such a contract, and before its completion, an accident happened favourable to the holder of the lands ; as if an earth useful in a particular manufactory were discovered in the neighbourhood, or any other collateral casualty of the like nature, the vendor would notwithstanding be bound to his bargain ; surely then it is consistent with equity, that he should not suffer by a casualty operating against the vendee.

Pope v. Roots,
7 Brown's Par.
Ca. 184.

As to the case of *Pope* and *Roots*, that seems to me to fall within another principle of equity. There A. seized in fee of certain tenements then in mortgage, being sixty years of age, and in perfect health, with a view to increase his income for his life, in July 1770,
by

by agreement in writing, contracted with B. * in consideration of 1s. and of an annuity of 70*l.* payable by B. as therein mentioned, on or before the first day of *October* then next ensuing, to convey those tenements to him and his heirs free from incumbrances; and it was agreed that A. should receive the annuity from the 5th of *April* then last past, and B. should take the rents and profits of the tenements from the same day. This agreement could not be performed at the day, by reason of the indisposition of the mortgagee, and two days after, viz. the 2d of *November*, A. met with a hurt on horseback, that occasioned his death on the 12th of the same month: Then B. instituted a suit against the representative of A. for a specific performance of this agreement, offering to allow them the half yearly payment of the annuity of 70*l.* that became due on the 5th of *October* preceding A.'s death. It was objected that the agreement was unfair and unreasonable, it being proved that, at the time of making, it was a very hard bargain; for the estate was then worth upwards of 800*l.* and the annuity might have been bought for less than 590*l.* And that an annuity of 95*l.* for the life of A. instead of an annuity of 78*l.* supposing him to have been in full health, would have no more than a * reasonable consideration for the purchase of the estate in question. *Besides, it was said, that B. had not carried the agreement into execution on his side, by paying the annuity on the 5th of October, when it became due; and on these grounds the plaintiff's bill, so far as it sought a specific performance, was dismissed, and that dismissal affirmed on appeal to the house of Lords.*

[* 77.]

[* 78.]

Now, although inadequacy of price alone is not, *when all parties are informed respecting that about which they are contracting*, a sufficient ground for a court of equity to refuse to give its sanction to a contract unless the consideration be inadequate in a degree that will warrant the court to conclude fraud from the *internal evidence* the transaction itself furnishes, yet it is a strong inducement to a court of equity to seize upon any other ground that the case may furnish; which, coupled with that, may warrant it to refuse its interposition. And therefore, the court of Chancery, and also the house of Lords, coupling together the inadequacy of the price, and the omission on the part of the purchaser of the estate to perform his part of the contract by payment of the annuity, when the first half year be-

came

[* 79.] came due, * considered him as not intitled to the favor of a court of equity ; in which way of taking up the question they were warranted, as well by the principle that governed Lord *King* in the case of *Powell* and *Pillet*, as by that which influenced Lord *Cowper* in the case of *Finch* and Lord *Winchelsea*.

Supra, Gilb.
Rep. Eq. 183.

Supra, 1 P.
Will. 277.

But if the transaction be not a contract of sale, properly so called, but an agreement which obliges the parties to make such a contract at a certain or uncertain time, then the seller remains proprietor of the thing sold, and is consequently liable to accidents and casualties. The effect of such an agreement being merely, that the seller engages, First, Not to make a contract of sale with another, in regard to the thing bargained for, before the time limited is past ; and, Secondly, To deliver the thing at the price agreed on, when the contract of sale shall be completed by the performance of the obligation on both sides.

Where money is appropriated to be invested in lands, and, by unforeseen accidents arising from no neglect of any party interested, it * suffers a loss, the parties entitled and interested therein must contribute equally.

[* 80.]

Chambers, et
al. v. Cham-
bers, et al.
Moseley 333.
S. C. Fitzgib.
137. 1 Eq. Ca.
Ab. 115, 116.
Viner tit. Con-
tract 513. Con-
tribution 567,
568.

Thus where A. on marriage of his son I. with E. covenanted by articles in 1718, to add 3000*l.* to the portion of E. which was 2000*l.* ; and that the 6000*l.* should be paid into the hands of trustees to be invested in a purchase of lands to the use of I. for life, remainder to E. for life, remainder in strict settlement : and two terms were to be limited to trustees, one to raise 2000*l.* for the portions of younger children, payable at twenty-one or marriage, or 1000*l.* for the portion of a younger child, the other for raising 3000*l.* for the portions of daughters in case there was no issue male of the marriage ; and the money was to be put out on government or other securities, at the discretion of the trustees, until a proper purchase could be found ; and the interest of the money was to go as the lands when purchased : The money, which stood out in South Sea annuities, was, in 1720, subscribed by the trustees into the South Sea Company, and by the loss of that year was reduced to about 3000*l.* Then the eldest son filed his bill against the trustees, his father, mother,

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* mother, brothers, and sisters, to have the money laid out in a purchase of lands, to be settled pursuant to the articles ; and that the shares of the younger children might abate in proportion to the loss. And it was argued, that this loss could not fall upon the trustees, for not only the act of parliament respecting the South-sea company indemnified the trustees, but the articles also authorized them to place out the money as they pleased. That therefore the justice of the case was, that the younger children should abate in proportion with the elder son ; and as by the articles they were, if there was a son to have one-third of the whole money, so they ought to have the same proportion of what was left. On the other hand it was contended on behalf of the younger children, that there was no case in which such a loss had been decreed to fall on one that had a charge on the inheritance ; that the charge was certain, the value of the lands to be purchased was uncertain ; the charge remained the same, whether the lands to be purchased were of more or less value ; and that the money being to be laid out in lands was to be considered as a real estate, and if the lands had been purchased and fallen in value, yet this certain pecuniary charge must have been * raised ; [* 81.] that the money, at the time of the articles entered into, was invested in South-sea annuities, which might fall in value, yet the parties had not provided for an abatement if such a case happened ; that, suppose the stock had risen according to the expectation of the parties, the younger children would have been no gainers by the rise, but the plaintiff would have had all the benefit, so by parity of reason he ought to bear the loss ; so if the money had been laid out in lands, the mines, escheats, and other casual profits, would have been his. But the court distinguished between cases where the money had been invested, and this case. Here the money had not been laid out in a purchase, and a deficiency had happened by placing it out in a lawful way allowed by act of parliament, which includes the consent of every one ; and the trustees had the authority of the parties to dispose of it at their pleasure. If any gain had been made it would have gone to all the children in proportion, as had been often judged in the court ; then, if a loss had happened, if the same proportion of what remained were given to the younger children, they had all that was designed them ; the parties to the articles

[* 82.]

[* 83.]

articles never designed that the younger children should have two-thirds of * the money, but one third only ; and they designed to provide for all the children, and therefore the younger children must abate in proportion to the loss.

Having considered the principles by which courts of equity govern themselves in the exercise of their jurisdiction in decreeing contracts in specie ; I shall next call the reader's attention to the effects and consequences which flow from this head of equity.

1 Vez. 175, 196.

The principle, upon which this equity is founded, being the rule, that whatever is stipulated to be done shall be there considered as done ; it follows, as a necessary consequence, that money contracted to be laid out in lands, being from the time of the contract bound thereby, must, from thenceforth, be taken as land.

Gilb. Hist. Ch.
243, Lord
Pembroke v.
Boden,
Ch. Rep. 115.

And the same principle will equally apply *vice versa* ; namely, that lands, by agreement stipulated to be turned into money, shall from thenceforth, being bound thereby, be taken as money ; and, therefore, if a man by articles agree to sell his estate, and part of the money be paid, and then he die before the * conveyances are perfected, and the vendee is willing to be off his bargain and lose the money already paid, and the heir of the purchaser likewise desires that the bargain may not proceed ; yet, if the executor of the vendor prefer his bill against the purchaser and the heir of the vendor to have the conveyance completed, and the residue of the money paid to him, a court of equity will decree it : Because, from the time of the bargain, the land of the vendor is to be looked on in a court of equity as money, and to belong to his executors ; for he by his bargain has turned it into money.

[* 84.]

But this rule of equity only applies, where the contract to turn land into money, or money into land, is positive ; for, if a power of election be left in one of the parties, there, he must, by some act, shew his intention to change the subject from what it is, or a court of equity will not consider it otherwise, than as in its proper shape : Therefore, where A. gave B. 500*l.* in trust, that B. should lay out the same *upon a purchase of lands, OR put the same out on good SECURITIES for the separate use of his daughter H.* (the plaintiff's then wife) her heirs, executors, and administrators, and died in 1729, and H. the daughter died in

Curling v. May,
M. term,
8 Geo. II.
cited 3 Atk.
256, et vide
Kettleby v.
Atwood,
1 Vern. 298.

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1731, without * issue, before the money was vested in a purchase; and the husband, as administrator to his wife, brought a bill against the heir of H. for the money, the money was decreed to him: For it was said, that, the wife not having signified any intention of a preference, the court would take it as it found it; that, if the wife had signified any intention, it should have been observed, but it was not reasonable then to give either her heir, or administrator, or the trustee liberty to elect: For, Lord *Talbot* said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testator's principal intention.

[* 85.]

And to entitle the heir to claim money as land, or the representative of the personal estate to claim land as money, or, to speak more properly, to claim money arising by sale of lands as personal estate, one or other of the contracting parties in the agreement for purchase or sale must be entitled to carry it into execution in a court of equity; for where such court holds, that the agreement ought not to be executed, there is no conversion of personal into real estate, or real into personal estate in consideration of the court: Because, * if the subject being land be not effectually converted into money, or being money be not effectually converted into land, it must be considered according to its original nature; and the executor, in the former case, and the heir at law in the latter, must have the benefit of it. Now, whether there be any such conversion depends on there being an effectual agreement, binding on all parties; so that, under all the circumstances, it ought to be carried into execution upon the general principle of equity before alluded to, that what is contracted for valuable consideration to be done, will by courts of equity be considered as done; all the consequences following, as if it had actually been so, and as if a conveyance had been made of the land at the time to the vendee. But, if the circumstances be such, that the agreement cannot, when application is made to a court of equity, though once it might have been, or ought not to be carried into execution, these consequences cannot follow; for the court must *then* consider the subject to be land or money, as it is in its proper and original shape.

[* 86.]

Money to be laid out in land, may be in three predicaments.

M m

First,

EQUITABLE JURISDICTION IN DECREETING

[* 87.]

Infra,

* First, it may consist of a particular fund placed in the hands of trustees in trust for third persons, according to the limitations stipulated in the articles or agreement respecting it. Of this kind is the case of *Kettleby* and *Atwood*.

Infra,

Secondly, it may consist of a particular fund, remaining in the hands of the person bound by the limitations stipulated in the articles or agreement respecting it, and by covenants therein. Of this kind are the cases of *Knights* and *Atkins*, *Lancy* and *Fairchild*, *Scudamore* and *Scudamore*, *Disher* and *Disher*, *Furham* and *Jones*, *Edwards* and *Lady Warwick*, and *Letchmere* and the Earl of *Carbisle*.

Infra,

Thirdly, it may consist of money vested in no separate or particular fund, but mixed with the general fund belonging to the contractor respecting it, or of the person claiming by virtue of the stipulation in the articles. Of this sort is the case of *Chaplain* and *Horner*.

Per Lord Parker, Chan. afterwards

[* 88.]

created Lord Macklesfield, vide *Pre. Chan.* 544. *Chaplin v. Horner*, 1 P. Will. 483.

In which ever of the last mentioned predicaments money to be laid out in lands is, it is nevertheless a declared rule of the court of Chancery, acknowledged as such as early as *the year 1720, that it is to be looked upon as land; and, therefore, if the grantee thereof die before a purchase made, or payment to him of the money, so that it becomes a question between his heirs and executors, which of them shall have the money? the heir shall be preferred, and it shall, for his benefit, be considered in a court of equity, as if the purchase had been actually made in the life of his ancestor for two reasons: namely, First, Because the heir is favoured in all cases rather than the executors. Secondly, because, if the executors should have it, it would be against the intent of the grantor, who meant to give it to the heirs.

Kettleby v. Atwood, 1 Vern. 298. *Hill*, 1684. *Ibid.* 471. *Mich.* 1687. S. P. in *Lingen v. Sowray*, as to part of the securities for money. Vide *infra*, et 1 P. Will. 172. *Mich.* 1711.

Thus, where, by articles made upon marriage, it was agreed, that, the wife having 1500*l.* portion, the husband should add 500*l.* more to it, and that the same should be deposited in trustees' hands, until a convenient purchase could be found out for investing it in land; which land, when purchased, was to be settled to the use of the husband and wife for their lives, remainder to their first and other sons in tail, remainder, &c. remainder to the right heirs of the husband. And, in the articles there was a proviso that,

*in case the husband died without issue, the wife might make her election whether she would have the land or money, and had six months time to make her election in. The husband died before a purchase made, leaving the wife enfeint of a daughter born soon after his death, and who died at a month old. The wife was administratrix to both husband and child, and made her election within the six months to have the money; and gave notice thereof to the brother of the husband who was his heir. He thereupon filed a bill to have the 2000*l.* invested in land, and settled according to the articles. *Lord Keeper *North* dismissed the bill with costs, saying, that had a bill been brought in the life-time of the infant, it being better and safer for the infant to have the land than money, he would have decreed the money to have been laid out for the benefit of the infant; †but that he did not see what equity the heir had against the administratrix. But on a rehearing this decree was reversed; because the husband having issue at his death, he could not be said to die without issue, and, therefore, no election could arise to the wife.

‡ So, in the case of *Lancy and Fairchild*, * money, § being by marriage articles to be laid out in land, and settled on the husband, and wife, and their issue, remainder *to the heirs of the wife*, was, the wife dying in the life-time of the husband, decreed to go to the heir of the wife, and not to her administrator; || the money being bound by the articles, according to the resolution in the case of *Kettleby and Atwood*.

¶ Again, where D. a freeman of *London*, being possessed of a certain sum *per annum* upon bankers' assignments (which were established by act of parliament, and made a perpetual annuity redeemable by parliament, and were therefore to go to the executor) previous to his intermarriage with E. and in consideration thereof, assigned over these annuities to trustees in trust that they should pay and apply these yearly annuities to such persons as should be entitled to the profits of his lands, which he had conveyed to the same trustees to the use of himself for life, remainder to his wife for life, remainder to his first and other sons, &c. remainder to himself in fee; and directed that, in case the principal should be paid in according to the act of parliament in that behalf made,

[* 89.]

*Vide *Hancock v. Hancock*, 2 Vern. 605. Hill. 1707. where the wife actually had an election, and yet the money was directed to be laid out in land; because she then had issue, and it was more beneficial for them.

† Note. The case of *Goodiar v. Clarke* 1 Sid. 102. was cited, per curiam, wherein *Windham*, Just. cited the case of *Bret and Piddridge*, on a deed with a proviso, that if a man's daughter should die without is-

[* 90.]

sue within two years from her marriage, her husband should repay part of her portion; the daughter had issue, and she, and her issue, died within two years, and adjudged that no part of the portion should be repaid, because by her having had issue, the condition was fulfilled.

‡ *Lancy v. Fairchild*.

§ 2 Vern. 105. East. 1687.

|| *Supra*.

¶ *Disher v. Dishier*.

1 P. Will. 204. Trin. 1712.

[* 91.]

In the case of the Countess of Holdernels v. the Marquis of Carmarthen, a perpetual annuity of 4000*l.* issuing out of the revenue of the post-office (but redeemable upon the payment of 100,000*l.* out of the exchequer, when the state of affairs would permit, which sum, when paid, was to be laid out in the purchase of lands to be settled in manner therein mentioned) was not considered as money to be laid out in land,

[* 92.]

but merely as a perpetual annuity, inasmuch as there was no certainty of the redemption. Bro. Chan. Rep. 377.

made, that then the trustees * should lay out the monies, in the purchase of freehold or copyhold lands to be settled to the same uses. Afterwards D. died without issue. And, on a bill brought by the brother and heir of D. against his widow and executor, it was decreed that these annuities, being redeemable by parliament, were as a mortgage assigned to trustees and directed, when paid in, to be invested in a purchase, and settled as the fee-simple lands were above settled; and, therefore, though the wife was to have an estate for life in the annuities by her jointure deed, yet, after her death, the annuities should not be looked upon as personal estate, a moiety of which, on such construction, would, by the custom of *London*, go to her representatives, but as money directed to be laid out in lands, and to be as a real estate, which, after the wife's death, would go to the heir of D.

And the law will be the same, if the person appointed to lay out the money die before it be done, and neither the executors, nor any other person, be named by the grantor to invest it; because, otherwise, it would put it into the power and election of the trustee to decide who should have the benefit of it; For, if the purchase were made, it must go to the * heir, but if the trustee, by delaying the purchase, might alter the right and give it to the executors, it would be governed by his will and inclination, and not by the will and inclination of the grantor, which would be very unreasonable and inconvenient. And therefore, although the trust for laying out the money be personally confined to the grantee, without naming executors, yet they shall be considered as implied and included in it.

Thus, where A. by her will in 1696, gave the sum of 8000*l.* to her daughter B. to be laid out by her in a purchase of lands, to be settled to the use of herself for life, remainder to C. and his heirs, and, in case he died in the life-time of B. to D. his heirs, executors, and administrators. C. died in the year 1714, and in the life-time of B. and D. in the year 1716, living B. having, about three months before his death, made his will, and E. his lady, executrix, and having given several legacies, and leaving F. an infant, his only daughter and heir at law. In the year 1717, B. died. the money had never been laid out. A bill was brought by E. against F. and against the executors of B. to have the money for the benefit of the executors and legatees of

Sedamore v. Sedamore,
Pre. Ch. 513.
Litch, 1720.

* of D. and that no purchase might be made for the benefit of F. the heir at law of D. And the lord chancellor was clearly of opinion, that the money belonged to F. the heir at law, as the lands would have done, if a purchase had actually been made as it ought to have been by B. the trustee. And his lordship decreed accordingly. [* 93.]

In the preceding case the court observed, that the case was the stronger because F. the heir at law, was an infant; and as B. survived D. two years, the infant heir might have brought her bill against B. herself, the trustee, to have had the purchase made; and her laches in not doing so, was not to turn to her prejudice, being an infant.

And, although the limitations in marriage articles go no further than to the heirs of the body of the husband and wife, yet, courts of *equity* consider what is the effect and consequence of the settlement; namely, that it is to give to money the properties of land, and as, had it been land, it would descend to the heirs general of the husband (i. e.) supposing it came from his ancestors; so, although in fact it be money, yet being in equity as land * it will descend in the same course as land would. [* 94.],

And, although money to be laid out in land, come, in truth, wholly, or in part, from the wife, yet, if no provision be made in what channel it shall go after failure of issue of the marriage, courts of equity will give it to the heir of the husband, upon a presumption founded on the general practice in such cases, that it was so intended.

The following case will illustrate both the foregoing propositions.

Upon the marriage of A. with B. daughter of C. it was agreed, that C. should give B. a portion of 1500*l.* and that A. should put 1500*l.* more to it, and that both sums should be laid out in the purchase of lands to be settled on A. for life, remainder to B. for life for a jointure, and on the heirs of their two bodies. A. died without issue, and B. married P. and died. Then the heir of A. brought his bill to have the money owing by B. (together with 1500*l.* more which he offered to lay down) laid out in a purchase according to the marriage

Knights v. At-
kins, 2 Vern.
20. 1687.

[* 99.] not to be laid out in lands, but ought * to be looked upon as personal estate, and the widow to be entitled to a third part of it. The ground for which was, that C. being to be tenant in fee of the land when purchased, and having an absolute power over it by will, or otherwise, and it being then actually but money, it should be esteemed in no other light than as money, *Sed. per curiam*, it ought to be taken as land, and to go to the daughter as heir; the dispute in this case not being between C. and the trustee, but between the heir and the executor, who became entitled to the money subject to the covenant. And it was decreed accordingly.

Edwards v.
Lady Warwick,
2 P. Will. 171.
Tinn. 1723.

Again, where A. on his marriage with B. who had a portion of 16,000*l.*—10,000*l.* whereof was agreed to be laid out in the purchase of lands of inheritance, to be settled on the issue of the marriage, with remainder to A. in fee. A. died leaving issue one son, who afterwards died. The money not having been invested, but being out on mortgage, the heir general of A. filed a bill to have it assigned to her. This was opposed by A.'s mother and administrator on the ground, that being then in itself money, it ought, by the statute of Distributions, to be divided between her and * A.'s sister. But it was decreed to belong to the heir; which decree was afterwards affirmed in the house of Lords.

[* 100.]

No difference has ever been made as to the consequences that flow from considering money as land, whether it be circumstanced in the one or the other of the before-mentioned predicaments; for the rule of equity will be precisely the same, whether the money be deposited in the hands of a third person to be laid out, or be resting in the hands of the covenantors, or in the hands of a person into whose possession it comes as land.

3 P. Will. 228.

Letchmere v.
Lord Carlisle.
2 P. Will. 224.
Ca. T. Talbot
91, 92.
Mich. 1733.
Easter 1735.

It was objected, indeed, in the case of *Letchmere* and Lord *Carlisle*, where Lord *Letchmere* had covenanted for himself and his heirs, to lay out 26,000*l.* in the purchase of lands, and to settle the same on himself and his wife, remainder to first and other sons &c. remainder to his own right heirs, on an application by the heir general for a specific performance, that this case differed from all that had preceded it: For that the money was never deposited, but remained in Lord *Letchmere's* own hands; and that he only was the debtor,
and

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and consequently his heir : So that * the heir was the debtor as bound in the covenant, and yet claimed as a creditor under the covenant. And it was said to be inconsistent for the same person to be both debtor and creditor : Besides, that, as far as the heir had real assets, the assets were at home already, and could not be sued for. But it was held by Sir *Joseph Tekyl*, Master of the Rolls, and his decree affirmed as to this part of the case by Lord *Talbot*, that this would make no difference ; an heir could no more be looked upon as a creditor against his ancestor, than he could be looked upon as a purchaser under him ; he took with the several burdens that his ancestor laid upon him ; and, as on the one hand lord *Letchmere* bound himself by his covenant to lay out this sum of 30,000*l.* in land, he on the other hand acquired a right to an estate for life, and to a remainder in fee ; which by his death, were severed, and the remainder only descended upon his heir. Thus, if a man articted for a purchase and bound himself, his heirs, executors and administrators, he might as well be called in that case both covenantor and covenantee, as in the present case ; but the heir was nevertheless entitled to have the purchase completed and might compel the executor to do it, because * their rights were different ; and where a man's design appeared to be to turn his personal estate into land, that gave his heir an advantage which a court of equity would never take from him. None of the cases cited warranted this distinction that was endeavored at, and in reason there was nothing to warrant it, the intent and agreement of the parties being the same in both cases, which if effectual in one case, there could be no reason why it should not be so in another. The case therefore fell within the common known rule, that money, articted to be laid out in land, was to be looked upon as land. Lord *Letchmere* was bound at the time of his death to lay out the money in land, by which he gained a right to an estate for life, with a remainder in fee ; and the estate for life being determined by his death, the right which he had to the remainder descended upon his heir.

It is true, there was a case in Chancery in Lord *Somers's* time, on articles made on the marriage of A. with B. by which it was agreed, that B.'s father, should pay 1500*l.* in part of her portion, which, together with a like sum to be advanced by A. within THREE

[* 101.]

[* 102.]

Chichester v.
Bickerstaff,
2 Vern. 295.
Trin. 1693.

EQUITABLE JURISDICTION IN DECREETING

[* 103.] * YEARS after the marriage, was to be invested in lands, and settled on the issue of the marriage, remainder to A.'s right heirs. A. died, and then B. died, both *within a year* after the marriage, and without issue. A. had made a will and devised the residue of his personal estate, after debts paid to his sister, making his heir at law his executor. And, on a bill filed by the heir at law to have the 1500*l.* paid him, it being to be considered and looked upon in equity as land, and therefore belonging to him as heir at law to his brother, the court decreed, that the money, though *once* bound by the articles, yet, when the wife died without issue became free again, and was under the power and disposition of A. (as the land would likewise have been in case a purchase had been made pursuant to the articles) and therefore would have been assets to a creditor, and have gone to the executor or administrator of A. and the case was much stronger where there was a residuary legatee. And the bill was dismissed.

Vide Contra,
Kettleby v.
Atwood, Lancy
, Fairchild,
Scudamore v.
Scudamore, all
of which are
cases where
there was no
trustee. Supra.

[* 104.] But a remarkable circumstance in this case, and what distinguishes it from all others which have as yet occurred is, that the wife died within three years after the marriage, during * which period the purchase was to have been made; so that the time was not come within which the money was to be laid out, and till then it continued money; and both Lord *Talbot* and Sir *Joseph Jekyl*, in speaking of this case in that of *Leichmere* and Lord *Carlisle*, in which all the cases on this head were collected and discussed, agreed in opinion, that the judgment in this case could not be maintained in opposition to so many decrees the other way, unless upon the foundation of this distinction; or under an idea that the court, in that case, had some evidence to induce them to believe, that the husband looked upon the money as personal estate.

Sed v. Brown's
Ch. Co, 238;
the doctrine of
this case con-
firmed and ap-
proved by
Lord Thurlow.

Vide Holt v.
Holt, 3 P. Will.
222, 223.
2 Vern. 322.

It is necessary here to observe that, in these cases of small limitations under articles, it is immaterial whether the claimants under them be purchasers for a valuable consideration or not; the foundation of their title not being in respect of the articles, *as being parties within the meaning of them*, but as heirs (by descent) of lands, the remainder in fee in which were vested in their ancestors, and which in course of descent fell upon them.

And this rule of equity, as to money article'd

* to be turned into land, is recognized and admitted [* 105.] in courts of law; for which reason where money, by marriage agreement, is articulated to be invested in land, that money is held, at law, not to be assets for payment of debts.

Thus, in debt upon obligation against B. as an executor and *plene administravit* pleaded, on a special verdict, the jury found a lease for years to trustees to raise 1000*l.* and articles of marriage, whereby a daughter was to have 1000*l.* to remain in trustees' hands for a year, unless the husband purchased, &c. and, if he did purchase, then the father-in-law covenanted to pay the sum of 1000*l.* to the husband, his executors, administrators, and assigns, and to pay interest until the purchase. They find that the land was not purchased, that the husband died, and that the wife received 300*l.* due for interest after the death of the husband. And hereupon it was contended on behalf of the plaintiff, that this was assets; for, though the wife in equity was to have the benefit of the land, yet, at law, till the fund was changed, it was assets, as an obligation to the husband. The receipt of money, it was said, followed the security, the money coming in * lieu of the debt which was here due to the husband: But the court was clearly of a contrary opinion; for this was no assets, the original money not being, in law, due to the husband or wife; and the covenant on the articles did not alter the former trust, nor did it take notice how the interest should be paid; nor was there any contract to pay interest after the death of the husband, but it was the result of natural justice, that he, in whose hand the money was, should pay interest to him to whom it was due. And judgment was given for the defendant.

And in the case of *Whitwick* and *Jermin*, wherein money was by a marriage agreement to be laid out in land, the court of Chancery would not let the money, as personal assets, be liable to other debts.

This principle, that money to be invested in land shall be considered as land, has been, in the application of it, pursued through all the variety of legal consequences which naturally flow from it. It has, therefore, been decided that there may be a tenancy by the curtesy of it,

Vide 3 P. Will.
217. *Lawrence*
v. *Beverleigh*.
2 Keb. 841.
Mich. 1672.
S. C. cited
2 Vern. 55.

[* 106.]

Whitwick v.
Jermin. 1 Vern.
471. cited 2
Vern. 58.

Thus,

[* 107.]
 Sweetapple v.
 Binton 2 Vern.
 286. Hill, 1705.

* Thus, where one devised 300*l.* to her daughter to be laid out by her executrix in lands to be settled to the only use of her and her children, &c. and the daughter married, had issue, and died, living her husband, and before the money was laid out in land; it was held, that, as if it had been an immediate devise of land, the daughter would have been, by the words in the will, tenant in tail, and the husband, consequently, tenant by the curtesy; so, the money being to be considered as lands, the husband should have the interest or proceeds thereof for his life, as tenant by the curtesy.

Cunningham v.
 Moody, *supra*.
 et vide 1 P.
 Will. 175.

So it was held by Lord *Hardwicke*, in the case of *Cunningham* and *Moody*, that, as the eldest daughter, by the first wife, would have been tenant in tail of the lands to be purchased with the 500*l.* there settled to be laid out in lands, she should have the same interest in the money: The consequence of which was, that the husband surviving was entitled to be tenant by the curtesy thereof.

Ibid.

[* 108.]

And, in the same case, it was questioned, whether the sister of the half blood would be entitled to the reversion in fee of the money *after the death of tenant by the curtesy, not as claiming from her sister; for in that right she could not have it, because, being but of half blood to her, she could not be her heir; but as claiming it from her father by descent, who by the same settlement took an estate for life in the money, with a remainder in fee to him, his heirs and assigns for ever, which, according to the ordinary rules, vested in him, and, then, whoever took afterwards must take through him: Because a person, claiming by descent after an estate tail, must make himself heir to the first purchaser if it were a remainder, or to the donor if a reversion, and not to an intermediate person to whom it descended, notwithstanding that person might have done what he would with it, as the sister being tenant in tail, might have done here. And it was held by Lord *Hardwicke*, that the reversion in fee, so vested in the father, descended to the sister of the half blood; for, when not clothed with possession, it followed the rule of *possessio fratris*, although it was not exactly the same case. And his lordship said, the case of *Kellow* and *Rowden* came up to this; for it was there held to be sufficient for a claimant, in such case to make himself heir to the person in whom the reversion first vested, without mentioning the intermediate persons

3 Med. Ca.
 226.

sons who never had the actual possession of the fee, but barely the reversion, although they might have charged, conveyed, or aliened it : And it was decreed, that the daughter of the half blood was entitled to the money after the death of the tenant by the curtesy.

[* 103.]

And money so predicamented, will pass in a will, under general words, as part of the testator's real estate.

Thus, where money in trustees' hands was bound by articles, whereby it was agreed to be turned into land, and settled on the issue of a marriage, remainder to the right heirs of the husband ; and he, there being no issue, devised certain lands to his wife, and the rest of his real estate in the county and city of *York*, and *elsewhere* in *Great Britain* to another person, and gave his personal estate, and all his securities for monies to his wife, whom he made executrix : It was resolved, that the articles having in equity changed the nature of the money, and turned it as it were into land, it should be considered as real estate, and pass under the description of lands *elsewhere* in *England*, and not as part of the personal estate.

Vide *Lingen v. Sowray*, 1 P. Will. 172.
Mich. 1711.
S. C. 1 Eq. Ca. Abr. 175, Pre.
Ch. 460.

* So, where the remainder-man in fee of 6800^l. vested in trustees, and bound by marriage articles to be laid out in the purchase of lands in *Great Britain*, or of some church, college, or other renewable lease, by his will devised all his freehold, leasehold, and copyhold lands lying in *Issington*, *Elsfield* in *Hampshire*, or *elsewhere* to A. and, after her death to B. and his heirs ; and, as to his personal estate of what nature and kind soever, he gave the same to C. paying his debts and legacies, and made C. executor. C. insisted, that the 6800^l. ought to be taken as part of the testator's personal estate, and as such pass to him as part of the residuum thus bequeathed by the testator's will. *Sed per curiam*, the articles say it shall be laid out in the purchase of lands of inheritance, or in church and leasehold estates. Then the court must take it to be the one or the other of these, and during the life of the husband and wife, if laid out, it must have been in one or the other of them. No sort of election was made by the husband. Then, at the time of the will and of his death, it stood in equity as it did in the articles, either to be laid out in freehold or leasehold, and, therefore the court would call it the one or the other

[* 110.]
Guidet v. Guidet, 3. Atk. 254. Trin. 1745.

[* 121.]

other of * those estates, according to the rule in equity, that what is agreed to be done must be considered as done. If it had not been for the *locality*, viz. estates in *Middlesex* and *Hampshire*, no doubt could have arisen; but there follows, “*or elsewhere*,” which is the most comprehensive word he could have used. It had been said, that the lands did not lie any where, for they were not yet purchased; when people made such descriptions as the testator had done here they intended to pass every thing they had in the world. Now the money was somewhere. It was, by the transmutation of the court, changed into land. Money was in *England* like *bona rotabilia* in the ecclesiastical court, which must be either in the diocese of the bishop where the person dies, or, in the diocese of the metropolitan, if he was possessed of monies in different places. So here, it was either in money or on a mortgage, and, therefore the word “*elsewhere*” certainly took it in. Then the testator must have considered it as laid out in either one or the other. If there had been only a general devise of his lands, this money would certainly have passed.

Brown's Chan.
Rep. 235.

[* 112.]

Sed quare, if
expressly de-
voted and lim-
ited as land.

But, although money so circumstanced be as land to many purposes, yet, it is not strictly so * within the statute of wills; for it will pass by a will unattested by witnesses. The reason of this seems to be, that, when the owner gives it by a will not attested pursuant to the statute, without any thing further said, he thereby shews his intention that it should be considered as money, and not as land; in either of which lights it may be viewed by him, if it be absolutely vested in him.

Contra of ten-
ant in tail,
vide *supra*,

Edward v.
Countess of
Warwick, 2 P.
Will. 173.

And although, *prima facie*, such money is, in equity, considered as land, and that idea is there followed up in all its consequences, so as to give it all the properties and qualities of a real estate, yet, *a tenant in fee* thereof may have it retained as money at his election; because, being absolute owner thereof, he might, if it were actually made land, turn it into money again immediately by sale; and a court of equity will not do so useless an act as that of compelling the owner to invest it in land, when he has the power of turning it the next instant into money again. But in order to make this equitable fund to be considered as money again, the owner must do something to shew that he has made that election.

* Ferrers v.
Ferrers, 1 Ch.
Rep. 17, 1625.

* Thus, where a remainder-man in fee of 4000*l*, in
the

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* the hands of his father-in-law, being his wife's portion, and which was agreed to be laid out in lands (accounting the 4000*l.* and interest, as part of his personal estate, she being dead, and no issue living) declared that it should go to his executors to pay his debts and legacies, and died, leaving F. his executor : It was determined by the court of Chancery and judges, that as if the land had been purchased, yet the wife being dead, and there being no issue living, the husband might have conveyed away the same from the heir at law, notwithstanding the agreement ; so 4000*l.* being to be paid by the bond to the son, his executors, or administrators, the same in law and equity belonged to his executors. And the money was decreed to the defendant, as the law had appointed, with interest.

† So, if the testator devise it under the description of *so much money* agreed to be laid out in land ; this will be sufficient to make it pass as personal estate, and by a will not attested by three witnesses.

And, it being merely a matter of election in the remainder-man in fee, in what light such a fund shall be considered, the only * object of enquiry is, what was his intent, which, being a matter of fact, lies in parol proof, and may be deduced from any act of the party, entitled to make the election, tending to evince his intent either way.

Thus, in the before-mentioned case of *Lingen* and *Sowray*, it was held that, (the remainder-man in fee having called in a part of the money laid out upon securities, and agreed to be invested in lands to be settled on the issue of the marriage, remainder to himself in fee, and put the same out upon *other securities* mentioned to be in trust for himself, *his executors and administrators*) so much of the original sum as was subsisting on the securities upon which it was originally placed, or on any other securities, where no new trusts had been declared, ought to be considered as real estate. But, as to so much of it as had been called in by the remainder-man in fee, and afterwards placed out on securities on a different trust, that should be taken to be personal estate ; for, there being no issue of the marriage, it was in the power of the husband to alter and dispose of it as against the heir at law, though not against his wife ; and the placing it out upon different

[* 113.]

† *Crofts v. Ad-denbroke*, Hill, 1719. *Fulham v. Jones*, Mich. 1720, both determined by Lord Parker, vide 3 P. Will. 221, note C.

3 Atk. 256.

[* 114.]

Lingen v. Sow-ray, 1 P. Will. 172, 176.

[* 115.] ent trusts was * an alteration of the nature of it, since the testator's declaring the trust to *his executors*, seemed tantamount to his having declared, that it should not go to his heir.

Chaplin v. Horner, 1 P. Will.
483. Mich.
1716.

So, in the before-mentioned case of *Chaplin and Horner*, where the tenant in fee of the 2000*l.* there covenanted to be settled, having *then* a daughter, had received 1350*l.* part thereof, and laid it out on a purchase for his life. On a bill brought by the daughter after his death as heir to her father, to have the covenant in the marriage settlement performed in specie, it was insisted, on the part of the personal representative, and held by the Master of the Rolls, that the payment of the 1350*l.* to the father, who would have had an absolute power over the land, if purchased and settled, was a good payment; and that the money ought not to be refunded by his administrator, in order to be invested in land for the benefit of daughter and heir.

Howes v. Lord Shrewsbury, 5 Bro. Ch. Par. 269.

[* 116.] And, where 12,000*l.* was article'd on a marriage to be laid out in land, and, subsequent to the articles, the statute of the 11th and 12th of *William the Third*, disabling persons making profession of the Popish religion from * purchasing lands was passed (it being admitted in the cause. that, at the time of the articles being entered into, the parties were *Roman Catholics*, and so continued to the time of their decease) the lords commissioners of the great seal, on a cause before them, were of opinion that the 12,000*l.* ought to be considered as money and not as land, and decreed accordingly; and this decree was affirmed on appeal to the house of Lords: One ground of which decision was, that it was not necessary to shew any express declaration of the party to the agreement, to whom the remainder in fee of the land to be purchased was limited, that the 12,000*l.* should be considered as money and not as land, the legislature having in effect enacted, that it should so remain and be considered, and should not be invested in, or considered as land. But if it had been necessary to shew any such consent or intention in the remainder-man in fee, in the eye of the law, his consent, as well as that of all other subjects, was supposed and considered as given to every act of parliament; and therefore, he, by passing this act, consented in the most binding manner, that the 12,000*l.* should not be laid out in land, but should remain in money.

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* The remainder-man in fee, entitled to a fund so circumstanced, may make his election, as well whilst the preceding particular estates are in *off*, as afterwards, to have it considered as money or land. Accordingly it was held, in the case of *Lingen and Sowray*, that the husband's taking fresh securities as to a part of the monies, which securities were mentioned to be to trusts different from those in the articles, shewed his election to alter the nature of the fund; and was valid for that purpose as against the heir at law, *though not against his wife*.

[* 117:]

Supra;

And, in these cases, even a parol declaration or direction from the remainder-man in fee will be regarded; for these cases do not fall within the purview of the statute of Frauds with relation to declarations of trust: Because the trust of the money is declared by the articles, the declaration is only in which shape the owner of the trust fund considers it. *Prima facie*, equity presumes it land: but that equity may be rebutted, by a parol declaration of the owner that he considers it money. He may elect, being absolute owner, which it shall be, it being privileged in equity to be taken as land or money at his option.

Per Lord Mansfield, 2 P. Will. 174.

* And very slight circumstances are sufficient to shew an intention in the owner to have such a fund considered as personal estate. As if a man entitled to money so circumstanced, and having the same in his own hands, but on securities in other names, transfers them into his own; for his so doing furnishes a strong ground to presume, that he means to take possession of those securities in the shape in which they are at the time of the transfer; and, in this respect, the case of securities so credited in the hands of a man's self, is distinguishable from the case of such securities in the hands of trustees; for, in the latter case, a transfer from one trustee to another, without an alteration of the uses, it is apprehended, would not furnish a ground to presume an intent to consider the fund other than as it exists in equity, namely as land.

[* 118.]

The case of *Pultney and the Earl of Dartington*, was decided on this ground. In that case 23,488l. was bound by will to be laid out in the purchase of land, to be settled on W. P. the elder, for life, remainder to his first and other sons in tail male, remainder to H. P. for life, remainder to his first and other sons

Pultney v. Earl of Dartington, Bro. Ch. Rep. 223.

in

[* 119.] * in tail, remainder to D. P. in like manner, remainder to W. P. the elder, father of W. P. in fee. D. P. died without issue male. W. P. the elder, changed all the securities in which the money was invested into his own name, and afterwards by his will, without taking notice thereof, gave his lands and his personal estate to H. P. in fee, and also died without issue male. Whereby H. P. became entitled to an estate tail, with a remainder in fee in this trust money. H. P. afterwards made his will, and, after disposing of some particular estates in *Middlesex*, gave all his other estates in *Middlesex*, and his estates in *Somerset*, *Montgomery*, *Salop*, and *York* (except the reversion of Lord B.'s estates) subject to a trust term to F. P. his heir at law for life, remainder to her first and other sons, &c. and gave all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, in trust, after payment of his debts, to lay out the rest in the purchase of lands, to be settled as therein mentioned, the ultimate remainder in fee to F. P. and, upon his death bed, gave F. P. his heir at law, 2000*l.* in bank bills. On a bill filed by F. P. as heir at law to H. P. to have this trust money laid out in land and conveyed to her in fee, the * cause was heard before Lord Chancellor *Bathurst*, Lord Chief Justice *De Grey*, and Mr. Baron *Eyre*, who dismissed the bill, and, on re-hearing before Lord *Thurlow*, that decree was affirmed.

[* 120.]

The principal argument in behalf of F. P. was, that H. P. had died intestate as to this property, and that, not having been in his contemplation, it must descend upon her as heir at law. But it was contended on the other side, and held by the court: First, That circumstances of demeanor in the person entitled to the remainder in fee, though slight, were sufficient, in cases like this, to decide the fund to be money again and not land. Receiving it from trustees would undoubtedly be sufficient. Then H. P. did receive this money, and had it in his hands. Secondly, That H. P. certainly did not mean to die intestate as to any thing. Then he had disposed of that part of his fortune that was actually land by local description, that part *then* that was not actually land, must have been meant to be compromised as personal estate. Thirdly, What rendered this more certain was, the circumstance of his giving F. P. 2000*l.* as it was improbable

he could have any idea at * that time that she would become immediately entitled to 23,000l.; for he could not think that, in that case, she would want an immediate supply. [* 121.]

But it is observable, upon comparing the circumstances of the preceding case with those that occurred in the cases of *Lingen* and *Sowray*, and *Guidot* and *Guidot*, and applying the principle that governed those cases to the case last-mentioned, that the circumstances of the funds having been taken in, and of the gift of 2000l. to the heir at law, were extremely material; for, otherwise, it might have been contended with some confidence of success, that, as the trust money was invested in securities in *Middlesex*, and as H. P. clearly meant *not* to die intestate as to any part of his property, the trust fund ought to pass as land in *Middlesex*, and not as personal property; for, in the cases of *Lingen* and *Sowray*, and *Guidot* and *Guidot*, it was held in similar circumstances, that such a fund would pass, by a devise, under the general description of "*lands elsewhere*," coming after particular lands described locally. Now, it seems a necessary consequence of the principle which supports that conclusion as to "*lands elsewhere*," after a * local description of particular lands, that, under a local description which embraces the local situation of the money, it shall pass as land there locally situated. So that either the doctrine of these cases, founded upon the maxim of equity, approved and sanctioned ever since that branch of our law has been formed into a system, "*that money to be laid out in land shall be considered as land*," and consequently treated as such in all relative situations, must be subverted and rejected, as decided against law; or money thus predicamented must be still considered as land, whether it be actually in the hands of the remainder-man in fee thereof (if he acquire it without any act done by him, merely in its legal course of descent) or of a trustee, until some declarations made or act done from whence a contrary intent may be presumed to be entertained by the owner, who has a right to give to it either the one or the other character.

And if all parties, entitled to the beneficial interest in money directed to be invested in land, agree to take it as money, a court of equity will permit them to take it in its then state.

Thus

Supra.

[* 122.]

[* 123.]
Badger v. Badger, Mosely
 117.

* Thus where the husband, by articles previous to his marriage, covenanted to purchase lands of 80*l.* a year value, in trust for the issue of that marriage, as tenants in tail in common, remainder in fee to his own right heirs; and on a bill filed for that purpose, a decree was made, that the husband should perform the articles; the husband died, and the younger children joined in a petition with the eldest son, to have the money paid to them and not invested in a purchase, and an order was made accordingly.

Oldham v. Hughes,
 2 Atk. 452.

But where there was a proviso in a subsequent agreement relative to money entitled in equity to the character of land, upon this contingency, that, if the tenant for life thereof died before the money was invested in land, *then*, it should be divided and go among the several claimants thereof, their executors and administrators; it was held by Lord *Hardwicke*, on a question respecting it which arose before that event, that, as that contingency had not happened, and the tenant for life was then living, the original trust was still subsisting for the money to be considered as *realized*.

[* 124.]

Oldham v. Hughes,
 2 Atk. 452.
Cunningham v. Moody,
 1 Vez. 176.
Et vide Pearce and March, 2 Vez.
 190.

* If the person entitled to the remainder in fee of a fund so circumstanced, be under any incapacity of affecting his real estate, he cannot, by any act, alter the nature of such money *realized*. Therefore, if it belong to a feme covert, being considered as real estate, she cannot alter the nature of it barely by a contract or deed; for, if it were actually land, to alter the course of descent a fine must be levied, a feme covert being under disability to pass her real estates by any other assurance.

So, if the owner be an infant, no change can be effected as to the character of such fund, by any act or declaration done or made before he comes of age.

Seeley v. Jago,
 2 P. Will. 389.

Thus, where one devised that 1000*l.* should be laid out in a purchase of lands in fee to be settled upon A. B. and C. and their heirs, *equally to be divided*. A. died leaving an infant heir, and B. and C. together with the infant heir, brought a bill for this 1000*l.* *Et, per curiam*, as to the share of the infant, that must be brought before the master and put out for the benefit of the infant, who, by reason of his infancy, is incapable of making an election.

But,

* But, in the case of a feme covert, the money may be got at without laying it out in land, by her coming into the court of Chancery and consenting to take it as personal estate: Because, upon her being present in court and examined, as a feme covert is upon a fine, as to such consent, the money articted to be laid out in land will be bound in equity, as much as the land would be by a fine at law; and she may thereby dispose of it to her husband, or any body else.

[* 125.]
Oldham v.
Hughes,
2 Atk. 452.
Et vide 1 Vez.
176.

A devise of an equivalent interest of the same nature as is contracted by an agreement, or articted, to be given or settled, may, in some cases, be taken as a performance thereof. But as every devise, *prima facie*, imports a bounty, it is incumbent on the parties claiming to be discharged by a devise from the articles or agreement, to shew that it was such testator's intention, when he made his will, thereby to perform the articles or agreement on his part; and such intention must appear either from the express words of the will, or the clear and manifest intention of the testator evident upon the face of it, or be extracted out of it by necessary implication. Therefore, in order to make a devise or bequest a performance * of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must at least be of such certain and known value or estimation, and so far of the same nature as the thing to be satisfied therewith, as to appear indisputably to be equivalent or superior, not only in gross value, but in annual income to the thing to be performed. The following cases will illustrate these propositions.

[* 126.]

If lands, of precisely the value covenanted on marriage articles to be purchased by the husband, be by him suffered to descend in fee, they will be considered to be intended as a performance of the covenant.

Thus, where W. upon his marriage, covenanted to purchase lands of the value of 20*l.* *per annum*, and to settle them upon himself for life, remainder to his wife for her jointure, remainder to the issue of the marriage in tail. And W. (who was a freeman of London) died intestate, having purchased lands of 100*l.* *per annum*, but not having made a settlement thereof, permitted them to descend upon his eldest son; this was held to be a performance of the covenant, for the value

Wilcox v. Wilcox, 2 Vern. 558. Moseley 167, 168. Et vide Blandy v. Widmore, 2 Vern. 709. Abr. 341. Et vide Mascall v. Mascall, 1 Vez. 323. where the covenantor devised an interest

[* 127.]
 squaring with
 that he had
 agreed to give;
 and the devisee
 held to an elec-
 tion; not that
 one was a satis-
 faction for the
 other, but as a
 completion of
 the act, the
 agreement be-
 ing a confirma-
 tion of the
 will.

* Vide Davys
 v Howard, et
 ux 5 Bro. Ca.
 Par. 552.

3 P. Will.
 225. 1 Vez.
 541.

[* 128.]
 + Vide 1 Bro.
 Ca. Par. 351.

1 Vez. 226.
 2 Vern. 298.
 Vide Bro. Ca.
 Par. 551.

Letchmere v.
 Lord Carlisle,
 3 P. Will.
 225. Ca. T.
 Talb. 80.

value of the lands corresponding * exactly with that of those covenanted to be purchased, plainly shewed that the lands were bought with an intention to satisfy the covenant.

* So if money be subjected to a trust, and laid out upon securities; and tenant for life of it, under the limitations, call in a part thereof with the consent of the trustees, and re-invest it in his own name without the interposition of trustees, and then die, leaving real estates, of which he was absolute owner, to descend to his heir, who would have been entitled to the money or land purchased therewith as tenant in tail; such estates descended will be considered as a compensation for, or a performance of the trust, except as to so much of the money as still remains on the old security, and in the names of the trustees; for, the presumption of compensation or performance, will not reach that.

But where the lands covenanted to be bought, are expressly stipulated to be lands of inheritance and in fee simple, the purchase of copyholds, leaseholds, estates for lives, or reversions expectant on estates for lives, will not be considered as a part performance of * such a covenant; † Because copyholds are subject to a different kind of tenure, and terms are not descendable to the heir, nor can an immediate profit be had from reversions, especially if they do not fall within the covenantor's own life.

So money, though of much greater value than land agreed to be purchased, given to the claimant under an agreement, cannot be considered as coming in lieu of the land; because money and land being of a quite different nature, the gift of the one can never be taken as a performance of a prior contract to settle the other.

We have observed that, in cases of implied performance, the intention ought to govern, and that there must, in all instances of this kind, be some positive evidence, or at least, some circumstance, furnishing a strong and necessary presumption, that whatever is taken to be a performance, was clearly and manifestly intended as such by the person effecting it. Upon that ground it has been held, where one, bound by a covenant made on his marriage, to lay out 30,000*l.* in the purchase of lands, was seised of land in fee at that time

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time of * the value of 300*l. per annum*, and afterwards died intestate without issue, and without having made a settlement of any estate ; that the covenant did not relate to the lands which were the covenantor's at the time of entering into the articles, the words being future, *viz.* that he *would* purchase. And then, as the intention of the party did not plainly appear, that his estate, which he permitted to descend, and which did not amount to the value of what he article'd to purchase, should be for or towards a performance, it should not be so considered : Besides, it was said that such inference would be to disinherit an heir by an implication not necessary, contrary to the known maxim of law.

[* 129.]

Vide Tooke v. Hallings, *infra*.

But lands, purchased at different times, but subsequent to such articles entered into or covenant made, will be considered (although not purchased in trustees' names, nor declared to be to the trusts of the covenant) as bound thereby ; not in the light of a satisfaction, but, under the notion of being a part performance, founded upon a presumed intent of the covenantor, at the time of the purchase made, to purchase pursuant to the covenant he was bound by, and, consequently ought to * perform. † And, therefore, Lord Talbot, in the case of *Letchmere* and Lord Carlisle, held, that, as under the covenant then under consideration, there was no obligation on the covenantor, as to purchases of lands in fee simple in possession, to lay out the whole sum at one time ; and, as there were lands in possession of inheritance purchased, which, though not purchased with the privity of the trustees, yet it was natural for the covenantor to suppose that the trustees would not dissent from those purchases, being entirely reasonable (the design of interposing trustees being not to prevent proper but improper purchases) and as, though these lands were not purchased within the time limited in the covenant, yet nobody suffered by it, and therefore that circumstance could not vary the intent of the party in a court of equity (which intent seemed to be, that, as soon as the whole money was laid out, the lands should be settled together, and not to make half a score settlements) it was reasonable to suppose, in the present case, that these purchases were intended to satisfy the covenant. And, as to these purchases, the decree of Sir Joseph Jekyl, that they were not made in performance

[* 130.]
† Ca. T. Talb.
92, 93.

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[* 131.] ance of the covenant, and therefore could not be taken as such, so far as * concerned them, was varied by his lordship, on the re-hearing.

Smith v Deacon, cited 1
Vez. 540. in
March 26,
1756.

The same principle of a presumed intent, (as to purchases made by the covenantor after an agreement to convey and settle houses, lands, &c.) to carry the agreement into execution, was recognized by Lord *Hardwicke*, in the case of *Smith and Deacon*, and governed the decision of the court in that case. And the point being re-agitated in the case of the Attorney General and *Whorwood* was given up, as decided in the two cases before-mentioned: And it was admitted by all parties to be then settled, that if a person, obliged under articles to purchase, did purchase, though not to the extent the articles required, such purchase should go to make good the articles, so far as it could be applied.

1 Vez. 540.

But, as the ground, upon which such after-purchased lands are considered as purchased in part performance of the agreement, is the presumed intention that the party purchased them with that view, in consequence of which the covenant or agreement attaches upon these estates as a lien on them in the hands of the purchaser and his heirs; that lien will not * follow them into the hands of subsequent purchasers or mortgagees: Because, whether the covenant or agreement shall attach upon them depends upon the intention of the purchaser, and the presumption that a performance is by him intended stands only till the contrary is proved; therefore any act, shewing he had not a part performance in view, as a mortgage or sale afterwards, will take away the presumption.

[* 132.]

Tooke v.
Hastings,
2 Vern. 97.

But it seems, that the presumed intent would be a lien upon the lands against a devisee; for the court said, in the case of *Tooke and Hastings*, that if a man covenanted or entered into a bond to settle land of such a value, or an annuity out of land of such a value, and had no land at the time of the settlement, but afterwards purchased land, *that* land should be liable against a voluntary devisee; and such devisee should be reimbursed out of lands left to descend to the heir, if there were any such.

And such after purchase, it seems, will not be liable to the debts of the purchaser.

Flower v. Flower.

Thus where, on the son's marriage, the father settles

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settled a lease for two years (held of the * Queen Dowager) on the son for life, and then on the issue of that marriage; *the son covenanted to renew the lease from time to time, and to assign the renewed lease to trustees to keep the same on foot as long as the wife, or any child of the marriage should live; and the son renewed the lease in his own name, and made no assignment thereof to trustees, and died greatly indebted without assets: It was held *per curiam*, that the lease was bound by the marriage articles, and should not be assets, nor liable to debts.

If one covenant to settle lands of a certain value on his heir, not specifying any lands in particular, and then die, and lands of greater value descend upon the heir, they shall be bound by the covenant.

Thus, where B. on the marriage of his son, covenanted for himself, *his executors and administrators*, to settle, †within one month after the marriage, lands of the value of 150*l. per annum* to the use of the husband, and first and other sons, and for raising portions for daughters; but no lands in particular were mentioned in the articles. And B. afterwards died having never made any settlement, and his son thereupon entered upon the lands whereof his father *died seised as heir, and married a second wife, and settled part of these lands upon her and her issue. It was settled, on a bill filed to have 150*l. per annum* settled pursuant to the articles on the first marriage, that, no lands in particular being mentioned in the articles, there was no lien upon any particular lands; and that therefore the only remedy was against the assets of the covenantor, and even that must be confined to his personal assets and would not reach his real assets; because, the covenant was only for him, his executors and administrators, and not for him and his heirs; besides which it was urged, that the second wife was a purchaser without notice, and could not be affected by the articles; But the Lord Keeper was of opinion, that, although no lands were mentioned by the articles, yet, the covenant should be a lien upon the land whereof the father was, at the time of entering into it, seised, unless he had purchased or settled other lands within the time limited by the articles.

But the ground of the preceding case seems rather to have been the presumed intent of the father, that the estate descending should be, to the extent of the covenant, a performance thereof, than that the covenant was a

[* 133.]
Plowman, 2
Vern. 289.
* See note,
the lease itself
was specifically
settled, and
then the re-
newal is only
a continuation
of it.

Roundell, et
al. v. Breary,
2 Vern. 482.

† Not to purchase.

[* 134.]

[* 135.]

• *Freemoult v. Dedire*, 1 P. Will 429.
 † Note, the distinction between these cases of a presumed performance of covenants and agreements to convert money into lands, &c. which do not stand upon the ground of satisfaction; and covenants as to the precise value of lands settled in jointure or the like: For, as to them, a money legacy to a like or greater amount than the deficiency will be

[* 136.] considered as a satisfaction, vide *Viscount Montague v. Sir George Maxwell*, 1 Bro. Parl. Ca. 553. Sed vide *Broughton v. Etrington*, *ibid.* vol. 7. fol. 12. et *Lee v. D'Aranda*, and *Bland v. Widmore*, cited 1 Vez. 521. et *Duffield v. Smith*, 2 Vern. 258. The distinction seems to be where the whole is satisfied, and where it is not. If a legacy or what is suffered to descend under the statute of

* specific lien; and this observation seems warranted by the following case, the only distinction between which and the preceding case appears to be, that the devise in the following case removed the possibility of a presumption, that any part of the testator's estate, not specifically bound, was intended by the covenant, to go in performance of it. *In the case I allude to there were several demands of several natures affecting the estate of a testator, he being indebted by bond and by simple contract, and having upon his marriage covenanted to settle specific lands, and also land that should be of the value of 60*l.* per annum upon his wife for her life; †His will charged all his estate, real and personal, with the payment of his debts. And it was held that, as to the specific lands, the covenant was a lien upon them; but, as to the settling of lands of the value of 60*l.* a year, it did not bind specifically any lands; wherefore, as touching that, the wife must come in only as a specialty creditor; and, in order to settle the quantum of the demand, the master must make an estimate of the value of the wife's estate for life, and she must come in as a creditor by specialty to that amount.

*A court of equity will decree the specific execution of an agreement notwithstanding the insertion therein of a penalty in case of a non performance; for, though it was anciently held, where there was a bond to perform any thing that the obligor was obliged to the alternative either to perform the thing or pay the money, and, therefore, that the obligation was discharged by paying the penalty; yet, it is not now taken as an agreement in the alternative, in which the obligor may either pay the money or perform, but the penalty is now understood only as an enforcement of the agreement, and as giving a remedy at law for a certain sum, instead of uncertain damages: And the party by providing his remedy at law, does not take away his remedy in equity: for it would be hard, that a man's enlarging his security at law should make him in a worse condition in equity than he would otherwise have been; ‡ nor can it be inferred, that the parties, by adding a bond to enforce the performance, intended to weaken the lien they had under the agreement.

|| Thus, where articles were executed for performance of an agreement for purchase of an estate, with a proviso that the purchase money should be paid by instalments, and that the purchase should be made by instalments, it cannot operate as a satisfaction, vide *Kerman v. Kerman*, Brown's Chan. Rep. 1786 fol. 95 † Vide *Bagg v. Foller*, 1 Ch. Ca. 188. S. C. 3 Chanc. Rep. 50 || *Howard v. Hopkins*, 2 Atk. 371. et vide *Hopkin v. Trevor*, Strange 533 et 2 Eq. Ca. Abr.

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vise therein, that, if either * side should break the agreement he should pay 100*l.* to the other. The vendor, meeting afterwards with a third person, who offered him two years purchase more than the vendee, immediately accepted of it. And one ground of argument on behalf of the vendor against a specific performance was, that it was the intention of the parties, that, upon payment of 100*l.* by either of them, the agreement should be void. *Sed per curiam.* As to the defence on the foundation of the sum stipulated, the court cannot consider that as a ground to let off either party when they please; it being no more than the common case of a penalty, which might be inserted by the vendee in order to be paid for his trouble of viewing and measuring the estate, taking plans, &c. supposing the defendant should not be able to make out a title.

But still this depends upon the nature of the agreement; for where the object of the agreement is damages only, there the penalty shall be the criterion of the injury.

Thus, where D. executor of C. employed as a master of a ship by the *East India* Company, covenanted with them that he should * pay a certain mulct for every cloth carried, &c. in the ship; and C. took D. as his mate who made an agreement *mutatis mutandis* with D. and gave a bond in the penalty of 50*l.* for due performance on his part; and E. without D.'s knowledge, carried so many clothes as the mulct thereof came to 70*l.* which the company deducted out of the master's wages: It was held, on demurrer to a bill filed against the mate for relief, that the executrix of the master could not have relief against the mate beyond the 50*l.* secured by the bond.

If new matter come out respecting an agreement, against which a decree has before been made in a cause between other parties, the court will, notwithstanding, support the agreement, although it has before decreed otherwise: For the person, not party to the original suit, is not bound thereby, and then, without any regard to a former decree, the court will judge upon the case before them.

Thus, where a lessee of a house assigned his term to B. who covenanted, in the assignment, to indemnify the assignor against the covenants in the original lease; C. bought

[* 137.]
55. 3. S. C.
2 P. Will. 192.
Nandike v
Wilkes, 1 Fq.
Ca. Abr. 392.
5 Gilb. Rep.
Fq. 114.

Davis v. Curtis,
1 Ch. Ca. 226,

[* 138.]

Natchbott v.
Porter,
2 Vern. 112.

- [* 139.] C. bought *the reversionary interest of the lessor, and then treated with B. for a surrender of the term ; and an assignment was made between them, and the key delivered and accepted : But, afterwards, C. altering his intention of living in the house, it stood empty for some years, and then C. brought a bill against A. the original lessee to compel him to admit an attornment, in order to his bringing his actions at law for the rent ; but B. was made no party to that suit. A. in his defence, insisted upon the agreement between B. and C. for the surrendering of the lease, and upon the delivery of the key pursuant thereto. But he was overruled in this at the hearing, and it was decreed, that he should go to a trial at law, and admit an attornment ; but A.'s attorney pleading that he never attorned, upon the cause coming back into Chancery, it was decreed that A. should pay the rent arrear. Then A. being dead, his executor filed a bill to be reimbursed against B. according to his covenant upon the assignment, upon which he could not recover at law, by reason that C. could not, at law, have recovered of A. for want of an attornment. B. by answer set forth the agreement made with C. for surrendering his term, the delivery of the key, and C.'s * acceptance of it, and therefore insisted, that he ought not to be charged. And upon the hearing of the cause, the court was of opinion that the agreement was well proved, and a good discharge, and that B. was not liable to answer any rent after that time ; and the court said, that though the court had decreed otherwise against A. yet B. being no party to that suit was not bound thereby.
- [* 140.]

Vide Plunket
v. Lord King-
land, 4 Brown
Par Ca. 567.

If any question of fact arises on a bill for specific execution of an agreement, a court of equity will direct an issue at law thereupon : As if it were contended, where an agreement for making a lease was by parol, that it was part of the agreement that a third person's consent or approbation should be had to make such lease valid, and whether, (supposing the obtaining such consent or approbation was part of the agreement) it were given or not : Or, as to whether another party (stipulating after such conditional agreement as above-mentioned made) had notice of that conditional agreement ; and the reason is, that, in such cases, whether the agreement was conditional, whether the condition was performed, whether there was any notice, or the like, are questions of fact which must be ascertained by

* by a jury, before the court can decree as to the principal question. [* 141.]

If, on a bill for execution of articles or of an agreement in specie, it appears that the one party, against whom the suit is preferred, insisted to have had clauses, usual in agreements of the nature of that on which the cause arises, inserted, and that the other party refused to insert them; the court will send the articles, if they relate to a purchase of land, to the master, to see if there are the usual covenants: Because the court, having a discretionary power, will not exercise it, unless the agreement be proper, and agreeable to the nature of the subject contracted about. But, if the contract be respecting a personal thing, it is different; because such things being to be had at one place as well as another, when the parties contracting for a purchase find that the parties contracted with, will not insert the usual covenants, they have no occasion to wait the event of a Chancery suit, but may go to another market to supply themselves. As if the contract be for a purchase of timber growing, and the purchaser had insisted to have the usual clause inserted in the articles, relating to the buyer's horses being permitted to graze on the * land where the timber stands; and likewise for indemnifying him in falling the timber, (that is, if it grow in hedge rows, and one side belong to a stranger, because they will be liable to trespass if it fall on the stranger's lands) and this be denied by the vendor; this will not be a ground to refer the cause to a master, the contract being personal, and the subject to be purchased elsewhere.

As a beneficial bargain will be decreed in equity, so likewise will one that happens to be a losing bargain; for the same reasons and principles apply to both cases.

Burton v.
Lester, et al.
3 Atk. 383.

[* 142.]

Vide 2 Vern.
398, 423.

[* 143.] * OF THE EQUITABLE JURISDICTION IN RELIEVING AGAINST UNREASONABLE CONTRACTS OR AGREEMENTS.

UPON this head of enquiry it is observable, that a court of equity will much more easily be prevailed upon to dismiss a bill which has for its object the specific execution of an unreasonable agreement, than to set aside an agreement, though it be not strictly equitable, on a bill for that purpose; for the latter is to deprive the party, against whom it is preferred, of that to which, by law, he has a right: And if a court be prevailed upon to set aside such an agreement, it will be on refunding what has been *bona fide* paid, and making allowances for improvements, &c.

Subject to the foregoing general observation, I shall now consider the principles on which courts of equity have exercised this branch of their jurisdiction.

[* 144.] * The better opinion seems to be, that the mere fact of a bargain being *unreasonable*, is not a ground to set it aside in equity, if the parties are of age, perfectly acquainted with their respective rights, each of them aware of what is done, free from any deception, and speak what they respectively mean: For, contracts are not to be set aside, because not such as the wisest people would make; but there must be fraud to make void acts of this solemn and deliberate nature, if entered into for a consideration.

Therefore where A. having an estate of 1000*l.* *per annum*, was a suitor to M. daughter of B. who was reputed very rich; B. upon proposal of a marriage made by A. agreed to give her 5000*l.* certain, but insisted on having a jointure of 5000*l.* so settled, that his daughter should have the inheritance thereof, if A. died without issue. These terms A. refused at first to assent to, but afterwards agreed to accept of. Thereupon a settlement of a jointure of 500*l.* a year was made, and a deed was likewise executed in the nature of a mortgage of all A.'s estate, for securing the payment of 5000*l.* to M. in case A. died without issue. A. died within a fortnight after the marriage

Vide infra.
Bosanquett v.
Dalhwood. Ca.
T. Talbot 38.

Whitfield et
ux. v. Paytor,
et ux. Show.
Par. Ca. 20.
Vide infra,
Keene v.
Thekeley, et
Vide Squire v.
Baker, 5 Vin.
Abr. 549. P.C.
12. 2 Eq. Ca.
Abr. 38. Pl.9.

* marriage without issue. Then M. preferred her bill [* 145.] to foreclose the equity of redemption. It was objected, on behalf of the heir at law of A. that he was a weak and sickly man; that the agreement was in its own nature unreasonable, it being that M. should have both portion and jointure, whereas one was the consideration of the other; and it was said, that both should be vested in the same person, the portion returned, and the jointure enjoyed, was very hard, and constituted an agreement that ought to be set aside. But, upon the hearing, a decree was made in favour of the agreement by the Master of the Rolls. And his decree was affirmed by the Lord Keeper on rehearing on an appeal.

But if there be any fraud in the transaction, then unreasonableness in the bargain, whether it be on the side of the vendor or vendee, will be a good ground, upon which a court of equity may be applied to, to set it aside.

Vide infra,
Clarkson v.
Hanway et al.,
2 P. Will. 203.
Cole v. Gibbons, et al.
3 P. Will. 290.
infra.

And agreements that are not properly fraudulent, in that sense of the term which imports deceit, will, nevertheless, be relieved against on the ground of inequality, and imposed burden or hardship on one of the parties * to a contract; which is considered as a distinct head of equity, being looked upon as an offence against morality, and as unconscientious. Upon this principle, such courts will, in cases where contracts are unequal, as bearing hard upon one party (though perhaps in themselves, and abstractedly upon general principles, equal; because, as to outward actions, the inequality to which both parties to a contract have consented, where there has been no lying nor concealment of any thing that ought to be discovered, is an inequality that passes for equality) set them aside: As if a covenant be inserted in a mortgage that, if the interest be not paid punctually at the day, it shall from that time, and so from time to time, be turned into principal, and bear interest. This covenant will be relieved against as fraudulent, because unjust and oppressive in an extreme degree.

[* 146.]

And the rule of equity applies equally, although the mortgage be of an estate in reversion, and not in possession. For the mortgagee knows his security to be a reversion, and he may bring a bill of foreclosure, or if there be a bond he may put it in suit.

Sir Thomas
Meere's case,
cited Ca. T.
Talbot 41,
et Mosely 247.
Lord Ossulton
v. Lord Yar-
mouth, 2 Salk.
449-

Thus,

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[* 147.]
Boadway v.
Morecraft,
Moseley 240.

* Thus where, in 1693, a reversion was mortgaged, and the mortgagor never paid the interest money ; but in 1711, the mortgagor and the mortgagee came to an account of what was due for principal and interest, and a new mortgage was made for the whole, with a covenant that, at the end of every year, if the interest was not paid within three months after it became due, it should bear interest : It was held by the Master of the Rolls, that this was a void covenant, and the mortgagor might redeem on the common terms.

Cole v.
Gilborne, &c.
3 P. Will, 290.

Again, Where A. made his will, and thereby gave a legacy payable to M. (a young man of about twenty-four years of age, who had led an extravagant life, and had lain for some time in *Newgate*) if he should survive C. the testator's wife, who was about sixty-four years old, and was to have it in case she should survive M. afterwards D. entered into an agreement with M. for the purchase of this contingent legacy, and contracted to give him 100*l.* for it, to be paid by 5*l. per annum*, at every *Christmas* ; with a proviso, that if M. should survive C. then what should remain due of the 100*l.* should be paid within a year after her death ; but if M. should * die in the life-time of C. then the 5*l. per annum* to continue until the 100*l.* should be paid to the executors, administrators or assigns of M. Lord Talbot, on a bill filed by D. on the death of C. against M. to have the 500*l.* paid him, said, that, had the case turned upon M.'s assignment, he would have set it aside ; not on the ground of its being a bargain with a young heir, which stood upon a different principle, nor on the ground of fraud or surprise, for nothing of that kind appeared ; but merely *as being an unreasonable advantage made of a necessitous man.*

[* 148.]

This being the rule of equity *even* in transactions which, strictly speaking, may be considered as lawful ; the principle applies still more strongly where the covenant or agreement is against an express law : As, if it be against the statute of usury.

Bosanquett v.
Dashwood, Ca.
Temp. Talb.
38.

Thus where A. in 1710, lent B. and C. traders, several sums upon bond, bearing 6*l. per cent.* interest, which was then lawful usage ; but A. taking advantage of their necessitous circumstances, compelled them to pay at the rate of 10*l. per cent.* : They submitted to this imposition, entered into other agree-
ments

ments for * securing the same, and continued paying 10*l.* per cent. from the year 1710 to the year 1724. Then B. and C. became bankrupts, A. died. and the assignees sued A.'s executors upon this transaction : It was decreed, at the Rolls, that the executors should account, and that legal interest should be computed and allowed for what had really been lent, and that what had been paid over and above legal interest, should be deducted out of the principal, and that the assignees should pay what should be due on the account. And this decree was, on appeal, affirmed by the chancellor:

[* 149:]

An agreement, infected with fraud *upon the face of it*, will be void in law, as well as in equity.

The above mentioned case of *Willis and Baldwin*, in which an agreement between two sutlers of militia, and the contractor for forage by the ration, that the latter might restrain the rations paying and allowing the sutlers nine-pence half-penny by the ration for every ration left, was held insufficient to support an assumpsit as founded in fraud, is an instance of this sort.

Willis v. Baldwin, Doug. Rep. 450. *Supra* pra.

In cases of fraud, or imposed hardship on one *party by another, it is no answer to the relief prayed, to say, " that the party applying was *particeps criminis* ;" for it cannot be said, in any case of oppression, that the party oppressed is *particeps criminis* ; since it is that *very* hardship that he is *obliged* to submit to (it being imposed on him by another, and not voluntarily acceded to) that constitutes the crime. Therefore a compliance with terms *opposed* that are illegal, as the payment of money with usurious interest thereupon, will not alter the relief in a court of equity ; for the money ought not to have been paid. Consequently the maxim, that "*volenti non fit injuria*," does not hold in any cases of fraudulent or hard bargains imposed upon one party, against which equity relieves. It is only the corrupt conscience of the persons which imposed such bargains that is to be considered ; that corruption alone entitles the party oppressed thereby to relief.

Bosanquett v. Dashwood, Cas. Temp. Talbot 40, 41, et *supra* et *Twisleton v. Griffith*, 1 P. Will. 310.

Ibid.
" 222

But where both parties are criminal in *equal degree*, there the maxim of "*volenti non fit injuria*" applies : As in the case of gamblers ; for, if two persons will sit down and endeavor to ruin one another, and one pays the money won, if, after payment, he cannot re-

Ibid. 414

[* 151.]

cover it * at law, a court of equity has nothing to do but to stand neuter : there being in that case no oppression on the one party, as there is in the instance before mentioned.

Ibid. et vide
Burney v. Pitt,
3 P. Will. 294.
in note.

If such inequitable advantage be taken of a man's necessities, and the securities procured from him be outstanding, so that the party holding them is to be redeemed ; a court of equity will decree, that, if the party holding them has received more than was due with legal interest, the surplus shall be refunded, and the securities delivered up ; which is agreeable to the common direction in all cases where securities are sought to be redeemed ; namely, " that if the party has been overpaid he shall refund." Thus it was decreed, in the before-mentioned case of *Bosanquett* and *Dashwood*, that, if the testator had received more than was due with legal interest, his executors should refund it, and deliver up the bond. For the chancellor said, that the party should not keep money that he had no right to *merely because he had got it into his hands*.

Vide supra. Ca.
T. Talbot 38.

[* 152.]

Ibid.

But if the transaction were at an end, and all * the securities were delivered up, the equity might possibly be otherwise.

1 Wils. 230,
231.
2 Vez. 518.
Brown's Rep.
Chan. Ann.
1787, fol. 175.
Et Griffith v.
Spratley, ibid.
179 in note, et
vide 1 Vez. 155.
et Wood v.
Fenwick, Prec.
Chan. 206.
S. C. 1 Eq. Ca.
Abr. 170. 2.
Nichols v.
Gould, 2 Vez.
222.

Inadequacy of price, *abstracted from all other considerations*, seems of itself (upon revision of the best authorities) to furnish no ground on which a court of equity can set aside or rather relieve a party to a contract ; the law of *England* having never fixed any certain proportion, that the price should bear to the thing purchased.

But if the cause of the inequality of price be founded in circumstances, from whence a court of equity may conclude, that the consent of the party to accept such price either was not free, or was conditional ; being had under an impression that circumstances were otherwise than they were represented to the party consenting to such unequal terms ; such a case, if the party contracted with be acquainted and take advantage thereof, will furnish adequate grounds for a court to set aside a contract so circumstanced.

Under the first of the distinctions above alluded to,
viz.

viz. the one party not giving a * free consent ; those contracts may be arranged, which are entered into under the impulse of distress in the one party known to the other party : And indeed in such cases, the observation made on the operation of fear in one of the parties to a contract applies ; namely, that, although the party may be said freely to elect the hard bargain offered in preference to his then state, and so to contract an obligation ; yet, the other party, who takes advantage of his circumstances to force him to enter into such obligation, acts fraudulently, and, therefore, wants the power of creating in himself a *right*, and thus the obligation fails for want of a corresponding right.

This was the true principle that governed the court in the case of *Herne v. Meeres* ; where A. and B. (father and son) being indebted to C. by bond, C. sued them thereupon, and was proceeding to outlawry, when they returned, and C. got possession of some part of their estate. Then B. who had divers estates, sold them to C. for less than half their value. Afterwards B. filed his bill for a discovery of all the estates of A. and B. and of what money was due to C. on the securities. C. insisted, that he was a purchaser for a valuable consideration. * At the hearing, the plaintiff's counsel relied upon the inadequacy of the price paid. And by the decree the lord chancellor declared, that the bargain made by C. with B. was not fairly obtained *in respect to the circumstances B. was in*, but ought in conscience to be made void, the premises purchased by him being more than double the value of the money paid by him.

It is hardly necessary to observe, that the fact the chancellor rested upon was, " the bargain not being fairly obtained in respect of the circumstances B. was in," which let in an equity, whereon the bargain being unfairly obtained, ought to be made void, being for less than half the value.

The principle established in the last-mentioned case, has, of late, being followed up by that profound lawyer, Lord Kenyon (when Master of the Rolls) in his decree in the case of *Heathcoate* against *Paignon* ; which decree was afterwards, on appeal, affirmed by Lord Thurlow.

The facts in this case were as follows : A lent to B. 100*l.* on bond. A short time afterwards A. agreed

[* 153.]

Vide infra this doctrine further explained.

Herne v. Meeres,
1 Vern. 465.
Brown's Chan. Ca. 176 in note.

[* 154.]

Heathcoate v. Paignon, Bro.
Rep. Chan. vol. ii. 167.
1787, East, Term.

[* 155.]

* to purchase of B. (being then thirty years old, but occasionally afflicted with the gout) an annuity of 50*l.* for the life of B. (to be secured by a bond and judgment, together with an assignment of B.'s salary as a commissioner of the Tax Office) for the sum of 200*l.* The writings were accordingly executed, and the purchase money paid. The bond debt remained undischarged until after the death of A. It was then paid, and, immediately thereupon a bill was filed by B. against the representatives of A. to be permitted to redeem upon payment of the 200*l.* with interest at 5*l. per cent. per annum.* On the hearing it was referred to the master to enquire, what was the value of the annuity on the day on which it was purchased, and also what was the market price, all circumstances of the state of health of the grantee being considered. The master reported, that he had been informed that the annuity was worth ten years purchase; but that the market price was about six. Whereupon his honour declared, that he was of opinion the purchaser, taking advantage of the seller's distress, purchased the same under the market price, and that, therefore, such purchase ought to be set aside.

[* 156.]

* The circumstances, which furnished evidence, of the seller having been distressed, and that his distress was taken advantage of in this case, seems to have been the buyer's having been acquainted with the seller's want of money; and his having enthralled him (the seller) by suffering him to contract a debt upon bond, by which means the buyer had him so far within his power, as that he might have distressed him on his non-compliance with his own terms, by suing him on his bond.

It is observable, on this case, that the *quantum* of the inadequacy is immaterial; if the cause that produces it arises from undue advantage taken of the circumstances of the seller.

The other instance, wherein inadequacy of price will be a ground to set aside a contract, is where it is caused by the seller having been led by the buyer to conceive the existence of something, that lessens the value of his property, for which there is no sufficient grounds; for, in such cases, the cause why the seller contracts at an inadequate price, is the apprehension, that his property is in a different state from what is really

really the case. The consent to * accept such terms, [* 157.] therefore, ought to be considered as given upon condition that the circumstances are as stated; and if they be not so, and *that* to the knowledge of the party contracting, the bargain is fraudulent on his side, and such from whence he can derive no right; consequently such as cannot induce any obligation in the other party.

This principle may be extracted from the case of *Baldwin and Rochford*, where the purchaser of some shares of a prize which was insured, knowing that the sellers had been refused any advance thereon by their captain, and threatened by him with being pricked as ran away from the ship, in which case they would have forfeited their shares, took advantage of these circumstances; representing to them the danger they were in of losing their shares, either in case they were pricked by the captain as ran away, or if the prize should happen to be retaken, at the same time telling them that the adverse fleet was out; under which circumstances he bought the sailor's interests for one-fourth of their value. Upon which grounds, principally, the court of Chancery set aside the contract.

Baldwin v.
Rochford,
1 Will. 229.

And although inadequacy of price, * considered abstractedly *qua* such is not a ground to invalidate a contract; yet, there is a great opinion (and which I trust will not be suffered to lie dormant, when occasion offers to give effect to it) that, taken in another light, and not merely in the view that the price is inadequate, the circumstance of inadequacy alone may be made a ground for setting aside a contract. I mean, in the light of furnishing *self-evident* demonstration, from the intrinsic nature and subject of the bargain itself, of *fraud*; evincing that the party who suffers the loss must have been imposed upon, and cannot be considered as having been in possession of an understanding adequate to render him capable of contracting; in which case no obligation could be incurred by him. [* 158.]

Thus, Lord *Thurlow* observes upon the case of *Heathcote and Paignon*, that, where there is such inadequacy as to evince, that the person did not understand the bargain he made, or must have been so oppressed as to be glad to make it, knowing its inadequacy, it will shew a command over him, that will amount to fraud. If the transaction be such as marks over-reaching on one side, and imbecility on the other,

[* 159.] it puts the parties in a situation, that shews it could not have taken place * without superior powers of the one side over the other.

And, even at common law, contracts, from which it is *prima facie*, self-evident, that one of the parties must have been entrapped, will not support an action.

Vide James v.
Morgan,
1 Lev. 111. as
alluded by
Lord Hard-
wicke, 2 Vez.
255.

Thus, where one agreed to pay for a horse at the rate of a barley corn for the first nail, and so on in a duplicate *ratio* to the extent of all the nails in his shoes, which were thirty two, and would have amounted to five hundred quarters of barley. *Inde*, chief justice, on an assumpsit, directed the jury to give the value of the horse, which was 8*l.* in damages.

And, in cases of the nature now under consideration, courts of equity, when applied to on behalf of the party imposed upon, and courts of law on assumpsit, administer the same measure of justice; for in both jurisdictions, the contract is considered as a security to the extent of the real value of that, respecting which the parties stipulate. Thus, in the before-mentioned case of *Heathcoate* and *Paignon*, the court decreed that the purchaser should receive all sums advanced by him for purchase money, insurance deeds, * &c. with 5*l.* per cent. per annum thereupon, giving credit for whatever should have been received on the annuity, beyond that rate of interest, as part payment of the principal. And, in the last mentioned case of *James* and *Morgan*, the contract was considered as evidence of an assumpsit, to the extent of the real value of the horse.

Et vide Earl of
Argyll v.
Mulchamp,
1 Vern. 237.

[* 160.]

Fear, occasioned by some unlawful violence of one party to a contract towards the other, furnishes, likewise, a good ground for equity to set aside an agreement. First, Because, according to natural right, all undue force, violence, or menace, that obliges men, contrary to their inclination, to give their assent, which otherwise they would not do, takes away that liberty which is of the essence of a valid engagement, and, consequently, renders all agreements, in such cases, null and void. Secondly, Because, although it were admitted that an agreement entered into under the impulse of fear, might be accounted spontaneous, in as much as a man so circumstanced voluntarily engages in a lesser evil to avoid a greater, yet, there is not still a ground whereon to raise an obligation: Because, every obligation

obligation on one side must be accompanied with * a correspondent right on the other; for, there can be no obligation unless a right answer to it, or be consequent upon it. Now, no injurious action can produce a right without a manifest contradiction; therefore, although the party engaging may be capable of contracting an obligation, the author of the violence is incapable to obtain any right by such extorted engagements.

[* 161.]

Accordingly an agreement procured through fear, though it be entered into with a view to render satisfaction for the grossest injury that the civil rights of society can endure, will be set aside in equity.

Thus, where a man caught another in bed with his wife, and the husband having a sword in his hand, and being about to kill the aggressor; and the latter, being naked, and in his power, implored the husband not to take advantage of him, promising that he would make him réparation; upon which they went into another room, where he gave the husband a note for 100*l.* payable at a certain time: Lord *Cowper* declared on a bill brought to be relieved, that, if the matter had rested on the original note, which had * been gained by a man armed from one naked and by duress, though it happened to have been given in satisfaction for the greatest injury, he should have made no difficulty of granting relief.

Anonym. cited
3 P. Wils. 294.

[* 162.]

And it would make no difference, if a contract were entered into through fear arising from an unlawful cause, whether that fear were occasioned by a third person, or by the party to the contract, that is, provided the latter were cognizant of it.

But, if the fear arise from a just awe or dread of a third person, who is a lawful superior, and who exercises his authority for a just end, the contract will be nevertheless binding; because, as has been said, the person acting under the influence of fear, consents spontaneously to submit to what is required of him, rather than take the consequences that may ensue a refusal; and the party with whom the engagement is made, does nothing to prevent himself from acquiring a right. This seems to be the principle upon which Lord *Hardwicke* founded his observation, in the case of *Cory and Cory*, that a reasonable agreement made between

1 Vez. 19.
1 Atk. 119, vide
supra.

[* 163.] between a father * and son, with a view to provide something for younger children, ought not to be set aside, on the ground of its having been entered into under the influence of paternal authority.

Bargains, *originaliy* oppressive, as well as those gained through fear, may, by subsequent acts of the party (dealt hardly with, or acting under compulsion) fit to create a right in the other party, be rendered binding; for, where a man is *fully apprised* of his right, and understands what he does, whatever may be the nature of the original transaction, a subsequent confirmation, when fully apprised, will make it good: Because if men, who *are free agents*, will, *with open eyes*, ratify *invalid* agreements, a court of equity will not relieve them. As if, in either case, the party on whose behalf, the equity would otherwise arise, having such relief in his power, and being acquainted with the then state of facts, confirms the transaction.

Upon this principle it was held by Lord *King* in the case of *Cole* and *Gibbons*, and assented to on a re-hearing by Lord *Talbot*, that the vendor, in this case, having by a deed of confirmation of the former assignment * made after he was in possession of the fact of the testator's being dead, of the bill's having been filed, and of the grounds of the executor's resisting it) ratified the contract, was bound thereby, and could not be relieved. So it being proved, in the last mentioned case of the note given to the husband by the person detected in bed with his wife, that the latter, on the husband's coming for the money, and his excusing himself from payment, gave his bond for it; it was held, he ought not to be relieved, as he had coolly, and without any pretence of fear or duress, entered into a bond to the husband, and, thereby, himself ascertained the damages which the husband ought to be paid, which must otherwise have been ascertained by a jury.

But, if such confirmation were obtained fraudulently, a court of equity would break through it, and impeach the original contract, however deeply intrenched behind fortifications of this kind.

Another head of equity, under which agreements or contracts are relieved against, is, that of fraud, collected or inferred, in the consideration of courts of

this

Vide 2 Vez.

152.

Cole v. Gibbons, *supra*.

3 P. Will. 293, 294. et vide

1 P. Will. 727.

[* 164.]

3 P. Will. 294. in note.

this description, from * the nature and circumstances [* 165.] of the transaction, as being an imposition and deceit on *other persons* parties to the original contract, but not parties to the *fraudulent* agreement : Of this kind are marriage brokerage contracts, wherein neither of the parties contracting have been deceived ; but which tend necessarily to the deceit of some party to the marriage, or of the parent, or of the friend. On this equity, a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian, will be void.

Thus where, on the marriage of the son of A. with the daughter of B. it was agreed, that the young couple should have so much for their present maintenance, and the son privately agreed with the father to release part of it : This agreement was set aside as an imposition upon B. though in that case the son, as was said, gave nothing but his own and he was at liberty to dispose of his present maintenance as he thought fit.

So where, upon a treaty of marriage between A. and B.—B.'s father would not consent to the match, by reason that A. owed two *hundred pounds to C. for which he and his mother stood bound ; the brother and the mother of A. to remove this objection, gave a new bond to C. for the payment of the debt, and thereupon A's bond was delivered up to be cancelled ; but A. gave his brother a secret bond to indemnify him against the debt and interest : It was proved that B. the wife, was privy to this transaction. *Per curiam*, this is a plain fraud ; for by this contrivance, the father of B. (which B. was the plaintiff, as executrix to her husband) was drawn in to give a greater portion : besides, he absolutely refused to marry his daughter unless A. was made a clear man, and, in particular, relieved from this debt.

Another head of equity also, particularly applicable to the cases now in discussion, is drawn from public utility, and is a part of the national policy, in that sense in which the word Policy is applicable to every thing that concerns the government of the country, of which the administration of justice makes a principal part ; and is that, whereby a court of equity, with a view to public utility, requires that particular persons, in contracts, should not only transact whatever is stipulated,

Sir Nicholas
Butler v. Sir
Henry Chan-
cey, 1 Eq. Ca.
Abr. 88.
Kemp v.
Coleman,
1 Salk. 156.

Redman v.
Redman,
1 Vern. 348.
[* 166.]

[* 167.]

bona fide, * between themselves, but also, that they shall not transact *mala fide*, in respect of other persons, who stand in such a relation to either of them, as to be affected by the contract, or the consequences of it.

Fitch v. Osborne,
2 Vez. 375.

Thus, where an annuity-bond was entered into by the husband's father to the wife's uncle as a trustee (she having a mother living) that he, during his own life, would pay 150*l.* *per annum* to the husband and wife during their joint lives, and to her if she survived him (the husband) which she did; afterwards a bill was brought to be relieved against this bond, on payment of 100*l.* a year, upon the foundation of an agreement, said to have been made between the husband and wife and father previous to the marriage, whereby it was stipulated, that although the bond was to import payment of 150*l.* *per annum*, yet the actual agreement was for 100*l.* *per annum* only. The basis of this secret agreement was stated to have been, that the original agreement was for 100*l.* a year, but that the wife had expectations from her uncle, and nothing of her own, and, therefore, had suggested that her uncle would be induced to do more for her, if the father did more for his son; that, in this expectation it * was agreed, the husband should let the bond run as if it were for 150*l.* a year instead of 100*l.* which would be for the advantage of the wife and children; that the father at first refused, but was afterwards prevailed upon to consent to this proposal; that, accordingly, the husband and wife had received 100*l.* *per annum*, and she had insisted upon no more, after she became entitled to it in her own right; there was a letter, during the treaty, from the father to his son, wherein it appeared, under his own hand, that the uncle had promised to do something on his part, though the father thought it better not to have it inserted, but to trust to his generosity; concluding with bidding his son go on to marry, and leave the management of the uncle to him; the uncle, on his death, gave every thing to his nieces.

[* 168.]

It was attempted in argument to distinguish the last-mentioned case from the general class of those on this subject, on the ground that the uncle, whom it was calculated to deceive, having neither contracted, nor given any thing on his part, it differed in the material circumstance on which they all turned, namely, "that it was a deceit *practised on a party*;" for the

uncle

uncle could not be said to be a party deceived. *Sed per * curiam*, laying all the transaction together, especially the father's letters, the uncle must be considered as a material party to the agreement on the marriage, and as one intended to be imposed upon by the private agreement of the others; the wife's dependance was upon her uncle, so that he, notwithstanding her mother was alive, must be considered *in loco parentis*. It was true, he was only named as one of the two obligees; but he could be no otherwise a party from the nature of the instrument, nor could the assent of an obligee be shewn otherwise: But he must necessarily be apprised of it. The father's letter to his son during the treaty, shewed *beyond doubt*, that he considered himself as treating with a person who was to provide for his niece out of his own pocket; that the uncle was to do something; and that it was the father's choice that it should be left out of the agreement, and that the uncle's honour should be trusted to. The uncle had fulfilled his expectation. If the uncle had contracted to give ever so little, the secret agreement could not have been supported. Then the father should not avail himself of its being left out of the written agreement, when it was done by his own choice. The whole must be considered, *in * equity*, as an *open* transaction between *four* parties for a treaty of marriage, and a *secret* transaction between *three* of them only in deceit of the *fourth*. The agreement then was fraudulent, and could not be supported.

Upon the same principle, namely that an agreement is a deceit upon third persons interested, although not parties, it is held, that if a man, being indebted, make a composition with his creditors by which they all agree to accept of a certain given sum for their debts, provided they all sign within a time limited; and one of the creditors refuse to sign unless the creditor will pay him one hundred pounds down, and three shillings in the pound over and above the nine shillings; the debtor shall himself be relieved against this agreement: It being fraudulent by destroying that equality, which was the inducement to the other creditors to come into it.

And, in the case of *Neville against Wilkinson*, Lord Thurlow said, that he would not lay it down as a rule, that fraud, in cases of this nature, must be upon an article *contracted for expressly*; but that any representation *misleading* the parties contracting on the subject

[* 169.]

[* 170.]

Small v. Brackley, 2 Vern. 602. *supra*.

Neville v. Wilkinson, Novem. 1782. Et vide 3 P. Wil. 75. last edition, in notes.

[* 171.]

of the contract, was within the principle of the cases. And his lordship relieved, by injunction, against a bond entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question: And this relief was given, although it did not appear that there was any actual stipulation on the part of the wife's father, in respect of the amount of the plaintiff's debts.

And an underhand agreement, although procured after marriage, if made in fraud, of a third person, will be set aside in equity.

Yelverton Pey-
ton, et al. v.
Baldwell, et al.
1 Vern. 240.

Thus where A. promised to settle certain estates on B. if a convenient match could be found for him; and, accordingly, treated on a marriage for him with the niece of C. and D. It was agreed between him and them, that C. should give his niece 2500*l.* portion, to be laid out in lands after his death, and that A. should settle lands of 300*l.* a year, whereof 200*l.* a year should be for a jointure; and that he should also settle other lands of the * value of 100*l.* *per annum*, on himself for life, remainder to B. and his heirs. A settlement was made by A. and a bond was given by C. accordingly. *After the marriage*, A. prevailed upon B. on promises of leaving him a greater estate by his will than he had agreed to settle upon him, and by other insinuations, to execute a writing, whereby A. was to receive the profits of the whole estate, allowing B. only 120*l.* a year, and B. was to assign over to him C's bond, and also to release or discharge the agreement for the settling the 100*l.* *per annum* on himself and his heirs after the death of A. The bill was filed by B. in order to be relieved against these agreements. It was insisted, against the prayer of the bill, as to the 100*l.* *per annum* to be settled on B. and his heirs, that B. had power to release and discharge it, and that there was no benefit thereby intended to the wife or issue of the marriage; for B. might have sold or given away those lands. But the court declared its abhorrence of such underhand agreements, that it was a deceit and fraud as to C. who was drawn in to give a greater portion with his niece, in expectation of a settlement adequate to it, which expectation, by this means, was frustrated; for, though B. might

have

[* 172.]

* have disposed of the lands which were to have been settled on him and his heirs, yet that was frequently done in many settlements; the father being, by that means, left at liberty to provide for his younger children, and to reward them most that behaved themselves best; but still there was a benefit intended to the issue of the marriage, and it was part of the consideration for which the portion was given. And the underhand release and agreement was held to be fraudulent, and decreed to be set aside, and the original agreement decreed to stand *in toto*. [* 173.]

The equity will be the same in favour of a wife deceived by her husband.

Thus where the mother joined in a settlement on her son's marriage, and accepted 15*l.* *per annum* in lieu of her jointure and claims: but, the day before the settlement was executed, took security from her son for 10*l.* *per annum* out of an estate not comprised in the marriage settlement, which the son covenanted to pay. The covenant was, after the husband's death, set aside by the wife, as a fraud upon the marriage agreement.

Lambe v. Han-
man, 2 Vern.
465, 499- Et.
v. de Turton
v. Benson,
2 Vern. 764.
1 P. Will.
496.

* So, if the fraud be practised on the husband, he also will be relieved: Therefore, where a marriage was treating upon between G. and a sister of P. and she, not having so great a portion as G. insisted upon, prevailed with her brother, to let her have 160*l.* to make up her portion, and gave him a bond for repayment of it, and thereupon the marriage was had: This bond was set aside as a fraud upon the husband.

[* 174.]

Gale v. Lindo,
1 Vern. 475.

And, in these instances also of underhand agreements in cases of marriage, a person, though *particeps criminis*, and not urged to what he does by necessity, will, nevertheless, be allowed to avoid his own acts: For the fraud infects the agreement throughout, and so doing vitiates it, so as that it binds none of the parties to it.

Thus, in the case of *Redman and Redman*, the widow, by whom the suit was preferred, was relieved; although it was in proof that she was privy to the whole matter, and contrived the mode pursued to satisfy her father, in order that the marriage might take effect.

Redman v.
Redman, su-
pra, 1 Vern.
348.

So,

[* 175.]

† *Gale v. Lindo*,
do, *supra*, 1
Vern. 475.

* † So, in the case of *Gale and Lindo*, where the bond was put in suit by the executor of the brother against the executrix of the sister who survived her husband; it was urged that, although the bond given in that case might be a fraud against the husband or his issue, who were to have the benefit of the marriage agreement, yet the husband being dead, and there being no issue, it was good against the woman herself, and by consequence against her executor: *Sed per curiam*, that which was *once* a fraud must be *always* so, and the accident of the woman's surviving her husband would not better the case.

But a distinction was taken where the agreement is made between the husband and wife only, and no third person is imposed upon.

Gifford v.
Gifford, 1 Eq.
Co, Abr. 88,
89.

Thus, where a son, in consideration of 3500*l.* which he was to have as a marriage portion with his intended wife, covenanted that his father should settle 30*l.* *per annum* on her as a jointure, and the father settled it upon her accordingly, and the son also gave a bond to leave his wife 1000*l.* if she survived; the son died, his wife surviving, and the father pretended that the wife ought not to have * any benefit of this bond, for, that it was in fraud of the marriage agreement; and the case of *Buller and Chancey* was cited. But the court distinguished this case from that, the father having been in *that* case a party to the articles, and deceived by the underhand agreement contrary thereto: whereas here, the son only was party to the articles, and was to have all the portion, and might give it as he pleased: And, therefore, it was decreed, that there should be no relief.

[* 176.]

Gale v. Lindo,
1 Vern. 475,
476, et vide
Turton v.
Benson, 1 P.
Will. 496. S.
C. 2 Vern. 764.
So resolved as
to an agree-
ment on mar-
riage, *Shirley*
v. Martin,
in Exch.
24 Nov. 1779,
vide 3 P. Will.
75, in note,
edit. 1789.

Agreements in fraud of a third person, that is, such wherein there is *actual* fraud, cannot be rendered binding by a subsequent promise or ratification, even of the parties to them, as agreements fraudulent in the eye of a court of equity, as imposing hardship on one party, may. Therefore, although it was stated in the case of *Gale and Lindo*, that, after the death of the husband, the wife agreed to repay the money, and actually paid part of it, yet, that was considered as of no avail; for, the original contract being *actually* fraudulent in the sense of *deceit*, no subsequent act could purge it of that quality.

Assigning

AGAINST UNREASONABLE CONTRACTS, &c.

† Assigning the benefit of such an agreement * over to creditors will not give it validity ; Because the act is not, in equity, considered as an assignment, the subject being in truth a chose in action, but is taken as an agreement only that the assignee shall have all the fair and equitable advantage and benefit of the agreement that the assignor himself is entitled to ; and if nothing be bound by the agreement, nothing can be assigned over.

‡ Nor would the equity of creditors be bettered, though it were shewn that they were in danger of losing their debts through a deficiency of assets ; for, still they must be paid out of the assets of their debtors, and not out of the estate of another man : For, when it is said that creditors are to be favoured, this is meant with regard to the rightful assets of the debtor, not to any effects belonging to another, which the debtor has wrongfully taken away, or possessed himself of tortiously.

But the equitable jurisdiction of courts of this nature of setting aside agreements, as well as that of decreeing them being in a degree discretionary, circumstances may occur, even in cases of agreements, *fraudulent* * in themselves, in the sense of deceit, which will induce courts of equity not to relieve against them, or set them aside.

Thus, in the case of *Small and Brackley*, where the plaintiff, having been entrusted to receive the interest due upon tallies, had pledged or mortgaged them to the defendant, and had received the interest *two* or *three* times, and paid it to her, and brought back the tallies and orders ; and, at last, wanting money, he had not only received the interest, but also the principal, and shortly afterwards failed ; and then the creditors of the plaintiff signed a deed to accept a composition of 9s. in the pound, so as all the creditors signed the deed within the time limited, or otherwise the same to be void ; but the defendant refused to sign and accept the composition, unless the plaintiff would pay her 100*l.* down, and 3s. in the pound over and above the 9s. in the pound ; and the 100*l.* was accordingly paid, and security given for the 75*l.* the residue of the composition money : The plaintiff brought a bill to be relieved against the agreement as fraudulent, being to blind the other creditors, but his bill was dismissed by the chancellor, his Lordship observing

[* 177.]
Sed per Lord Parker, a bond so given is not so absolutely void, as that it may not upon some new consideration or deliberate act be made good,
1 P. Will. 499.

† Turton v. Benson,
1 P. Will. 499.
et vide 1 Vez. 123.

‡ Vide 1 P. Will. 499.

[* 178.]

Small v. Brackley,
supra,
2 Vern. 602.

[* 179.] * observing that, as the plaintiff had been guilty of as great a fraud and breach of trust as could be without being criminal, and had agreed to make some satisfaction, and *he* ought not to be relieved in equity.

Again, where a private agreement was made in fraud of a public contract upon a marriage, the setting aside of which would have been injurious to a former agreement also made upon a marriage; the court considered the *first* agreement as *entitled* to the preference, and therefore refused interposing to set aside the last.

Roberts v.
Roberts 3 P.
Will. 66.

Thus, where A. son of B. intermarried with C. who had a portion of 4000*l.* and B. (who was tenant by the curtesy) joined in settling a good part of his estate on A. and his wife in possession, the remainder having been previously limited to A. by his mother's marriage settlement, with a power to B. (*first* paying or securing 1000*l.* to his son) to settle 200*l.* *per annum* out of the estates upon any other wife he should marry. B. afterwards proposed to marry D. who had 3000*l.* portion, and previous thereto, offered to settle 200*l.* *per annum* upon her. But, it appearing that the

[* 180.] 1000*l.* must * be paid to A. which would greatly embarrass him (B.) D.'s relations would not consent to the match. Upon this B. applied to A. to release the 1000*l.* which he, by letter to his father, agreed to do; but neither his wife, nor any of her relations, were consenting to such release. However, previous to an actual release executed, the son insisted that his father should give him a bond for the payment of the 1000*l.* within a short time after his marriage, to which the father consented; but that was done also without the privity or consent of the intended wife, or her relations. Then the release and bond were mutually given, the marriage was had, and the portion of 3000*l.* paid. Afterwards A. sued his father upon the bond, and the father preferred his bill against the son to be relieved against this bond, on the ground of its being a fraud upon the second wife, and her relations, who would not have consented to the match had they known of this under-hand bond. But the court was of opinion, that the bond must be paid; because, whatever arguments might be made use of in favour of D. the father's second wife, or of himself, to prove that he ought to be discharged of the bond for payment of the 1000*l.* the very same arguments might be urged

* urged on behalf of the son and his wife, to prove that it ought to be *paid* ; for suppose it to be a hardship upon the father's second wife, that her husband should be forced to pay this 1000*l.* in breach of the public and open agreement made by the son, was it not equally an hardship, upon the son's wife, and as much a violation of the open and fair agreement made on her marriage, that the 1000*l.* should not be paid upon the father's making a second jointure ? The consequence of which was, that as the agreement on the son's marriage was the first, it ought to have the preference. *Qui prior est in tempore, potior est in jure.* Wherefore, since the payment of this 1000*l.* by the father, might as much contribute to the comfortable subsistence of the son and his wife, as the non-payment of it might conduce to the comfortable living of the father and his wife : and as, by means of this bond, the son had the law on his side, the bond, it was determined, must be paid.

Upon the same principle of national policy (to prevent catching bargains with heirs, reversioners, or expectants, which have a tendency to seduce them from a dependence on * their ancestors, who, it is presumed, will support them properly, by feeding their extravagancies, and tempting them, in their father's life time, to sell their reversion of estates settled upon them, or to barter away their expectancies on terms manifestly ruinous) a court of equity uniformly sets its face against all bargains made with persons so circumstanced. And the court of Chancery has at length, not without great difficulty, put a stop to so destructive and mischievous a practice, by setting aside all contracts made with heirs or expectants for the disposal of their expectancies ; considering them as intrinsically corrupt, fraudulent, and unconscionable, encouraging disobedience and extravagance in heirs and expectants on one hand, and avarice, fraud, and imposition on the other. And indeed, in most of these cases, deceit and illusion on other persons, not privy to the fraudulent agreement, has concurred ; the father, ancestor, or relation, from whom the expectation of the estate has sprung, have been kept in the dark ; the heir or expectant has been prevented from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and reformation ; by this the ancestor also has been misled,

[* 181.]

Vide Earl of Arglais v. Muschamp.

1 Vern. 75.

[* 182.]

Nott v. Hill, ibid. 167. Earl of Arglais v.

Pitt, ibid. 239.

Berny v. Pitt.

2 Vern. 14.

Twissleton v.

Griffiths, 1 P.

Will. 310.

Earl of Chesterfield v. Jan- sen, 2 Vez.

125.

[* 183.]

and * induced to leave his estate not to his heir or family, but to a set of artful persons who have divided the spoil before hand.

And, although such bargains be actually carried into execution courts of equity will, nevertheless, if the performance be occasioned by the apprehension of compulsion, set them aside, and decree the vendee to reinstate the vendor in his expectations, on payment of what was actually advanced and legal interest.

Curwyn v.
Milner, 19th
June 1731,
3 P. Will. 292
in notes.

Thus, where an heir of about twenty-seven years of age, and who had a commission in the guards, borrowed 500*l.* on condition that he should pay 1000*l.* if he survived his father and father-in-law ; but if he died before his father and father-in-law ; then that the lender should lose the 500*l.* The heir surviving his father and father-in-law, was relieved by Lord King against this bargain, although he had paid the money, *the payment having been made for fear of an execution.*

[* 184.]

Berny v. Pitt,
2 Vern. 1, 4.
3 P. Will. 294.
Knott, et al, v.
Johnson, et al.
ibid. 27.

And relief was decreed in equity, on a rehearing, upon a contract of a similar nature, after the money had been paid, *in compliance * with a former decree, made in support of the contract.*

In the case alluded to A. had supplied B. an heir in his father's life time, with the two several sums of 1000*l.* and 1000*l.* on condition to have 2500*l.* for each, if B. survived his father, or else the principal to be lost ; and A. had obtained from B. two judgments of 5000*l.* a piece defeazanced for the payment of the said 2500*l.* for each ; and Lord Nottingham, on the first hearing (9 Feb. 33 Car. 2.) granted relief only against the penalties ; but, on a rehearing before Lord Jefferys (27 Jan. 2 Jac. 2) the former decree was discharged (though B. had been constrained, in obedience to the decree, to pay A. 5390*l.*) and B. was ordered to be restored to the money paid *ultra* the 2000*l.* originally lent and the interest for the same, with interest from the time A. had received it.

And no subsequent acts of the heir, though voluntary, and not under any apprehension of legal duress, will help such a contract, if the heir at the time be under any misapprehension, and not fully apprised of the nature of his right : As if the heir write letters after the death

* death of his ancestor, approving of the bargain as fair; or suffer the vendor to lay out money afterwards in beautifying and improving an estate, purchased under such circumstances.

[*185.]

Thus, where T. B. the son of R. B. (which R. B. was tenant in tail, remainder to himself in fee of an estate, worth about 3000*l.* and about seventy-two years old, afflicted with the gout and a rupture, and his life not worth above one year's purchase) being heir expectant in tail, and in *necessitous circumstances*, by articles of agreement in *October* 1739, in consideration of 1500*l.* to be paid to him by P. (who was an attorney concerned for R. B. and conversant with his family settlements) within a year; and of an house worth 200*l.* to be conveyed to T. R. covenanted, without the knowledge of his father, to convey to P. this estate in fee simple, subject to the estate of his father for life; and soon after the signing these articles, T. B. was desirous to be off the bargain, but P. would not let him. In *November* 1739, a lease and release was prepared by P. and executed at P.'s house, where nobody but P. his son, and another person were present. T. B. therein among other things, covenanted that he was seised in fee, * and that there was in the deed a clause of warranty against R. B. and his heirs, and the use of a fine formerly levied by T. B. was declared to enure to P. in fee; and in consideration hereof, P. conveyed to T. B. the house, but in the latter conveyance there was no such covenant or clause of warranty as in the former. The 1500*l.* in money was to be paid. P. made out that he paid it thus, *viz.* to Lord O. 550*l.* owing to him by T. B. on a mortgage of another estate; 200*l.* T. B. owed to P. himself; 250*l.* which P. pretended he paid him in cash; and for the remaining 500*l.* P. gave T. B. a bond, to pay it within a limited time after T. B. should have suffered a recovery to P.'s use. All the writings were drawn by P. and T. B. had no copy of them, nor was any counsel or attorney concerned for him. R. B. the father, died in *July* 1740, nine months after making the articles. T. B. immediately wrote to P. acquainting him of his father's death, and informing him that he should act in all respects agreeable to his wishes; and in another letter he told P. that he should always act justly, and said that P. has got a good bargain of him, and that he could afford to give him a buck, but that he should not

Baugh v. Price,
1 Wils. 320.

[*186.]

not

- [* 187.] not touch one without P.'s * consent. After this T. B. filed a bill in Chancery, to set aside these articles and conveyance, and to be relieved; to which P. put in an answer denying the fraud, &c. charged. T. B. being at this time indebted to P. was, by being threatened to be sued and other acts, intimidated from proceeding in Chancery, and prevailed upon to execute another deed, dated in *October* 1741, reciting the proceedings in Chancery, and that the purchase was a fair one, and confirming the estate to P. afterwards T. B. and P. settled all accounts. In 1743, T. B.'s bill in Chancery was dismissed, and in 1746 he died. Soon after which T. B.'s son preferred a bill in the exchequer to be relieved from this bargain, upon paying to P. the purchase money and interest, and for all necessary and permanent repairs. And it being held, first, that this transaction, under all the circumstances of it, was *clearly* fraudulent, and such as the court of Chancery would have relieved against in the first instance; the next question was, whether T. B. by any act, subsequent to the bargain, had purged the fraud and imposition? And the court were of opinion unanimously, that he had not, and that the son ought to be relieved; for that, as to the * letters which had been relied on as shewing that T. B. thought the bargain a fair one, they availed nothing, being written before he knew the real value of the estate; and that the arts and threats used by P. to get rid of the first suit, were as fraudulent as the original bargain, and the recital in the release executed thereupon was false; for the bargain was a very unfair one, and *suppressio veri*, or *suggestio falsi*, had always been held sufficient to set aside a release. And, as to the charge that T. B. had stood by during his life, and seen P. lay out great sums in repairs, ornamental additions, &c. T. B.'s acquiescences were founded on a mistake into which P. led him. And the articles and deeds were decreed to be set aside, on the plaintiff's paying the defendant his principal and interest, and allowing for all needful repairs.
- [* 188.]

Chesterfield v.
Jansen, 2 Vcz.
159.

But, if a contract for an expectancy be *expressly* shewn to have been free from fraud or imposition, and the vendor being fully informed and with his eyes open, ratify the contract, he will, by such new agreement, bar himself of the relief he might otherwise have had in a court of equity. But such ratification must be
after

after full information, freely, without compulsion, and at a time when the vendee is free from all restraint or apprehension from the person on whom the expectancy rests; and when it cannot be said that there is any person on whom any deceit can be committed by reason of such new agreement, and there is no impediment against the party, supposed to be imposed upon, seeking relief, by disclosing his case to a court of justice.*

[* 189.]

And, if an agreement be entered into under an undue influence, and in circumstances of such a nature as furnish a fair inference, that one of the parties had an advantage over the other, it will be set aside in equity. Therefore, where A. married the heiress of G. and the marriage articles were agreed on with great deliberation, and one of them was, that A. should, within two days after marriage, for the peace of the family, release to the mother and guardian of the lady all accounts of the mesne profits of the estate; it being insisted upon by the mother, and admitted by A. that the charge of the education of the young lady, and the interest paid by the mother upon the mortgage of a good part of the estate, which had been discharged by her as guardian, would come to as much as the * profits of the estate. The lord chancellor said, on making the decree upon the bill in equity filed by A. to be relieved from this agreement, and for an account of the mesne profits of the estate, that, admitting there was no surprise in obtaining this covenant from A. (and there seemed to have been none, it having been agreed upon after great deliberation and advice by consent on both sides) and admitting there had been no concealment of the matters to be accounted for, this covenant to make such release ought nevertheless to be set aside; as it seemed to be extorted from A. by one who had power over the young lady courted by him, as her parent, which power ought not to have been made use of in this manner; that it was as if the mother should say, you shall not have my daughter unless you will release all accounts: That brought the case within the same reason as marriage brokerage agreements; for a bond to give money if such a marriage could be obtained was ill, and by the same reason a bond to forgive a sum of money, must be ill. And the covenant was relieved against.

Duke of Hamilton v. Lord Mohun, 1 P. Will. 118.

[* 190.]

Sed note, such release, had it been given by the husband, after marriage, might have been good: the reason of the difference is, because, being given after marriage, it must be presumed to have been given freely, *ibid.* 120.

A court of equity will rectify errors in their proceedings,

[* 191.] *ceedings, although there be an agreement entered into by the parties to a suit, to abide by the decision of the court on the merits, notwithstanding any mistake in form.

Buck v. Fawcett, 3 P. Will. 243.

Thus where, upon a bill brought in equity, the parties or their clerks in court entered into and signed an agreement, which was afterwards by consent, made an order of court; that both parties would submit to such decree as the court should make in the cause, provided it should be on the merits, and not on any mistake in the pleadings, and that neither party should bring an appeal; an order for a re-hearing was directed to stand, although a motion was made, upon the ground of the preceding agreement, to discharge it: The chancellor observing that, had the agreement been disclosed to the court, such order would not have been made; for, until a decree was signed and inrolled, all matters were open; and if there was any error in a decree, it was fitting the court should have an opportunity of amending it.

[* 192.] Where an estate is directed to be sold before a master, any agreement respecting it, to take * it out of the ordinary course of sale, in such cases, will be void.

Annesley v. Ashurst, 3 P. Will. 282.

Therefore, where a trust estate was decreed to be sold for the payment of debts and legacies to the best purchaser before the master, and A. contracted for the purchase, and entered into articles with the trustees for that purpose; and it did not appear that the purchase was an unfair one, but this method seemed to have been taken to avoid the charge and trouble of bidding before the master, and of the master's report, and of getting it confirmed; the court, (on a bill against the trustees to compel them to convey, which they were willing to do on being indemnified) would not make a decree; saying, this was all going out of the way; the former decree must be pursued, and one decree could not be made to contradict another. If A. wished to purchase the estate, he must go before the master, and get himself reported the best purchaser; and though nothing unfair appeared, yet there was every occasion to suspect when people were going out of the way.

* P. Will. 156. 220.

An agreement to stifle a prosecution for felony is

* is not lawful, and cannot be executed in equity ; [* 193.]
but where there is a fraud, and the party wronged by the fraud comes to an agreement whereby he is to be satisfied for such injury (as in conscience he ought to be) this agreement, it is said, is lawful, and may be enforced in equity ; matters of fraud being cognizable and relievable. as well in equity as at law.

But the distinction above-mentioned, between an agreement respecting fraud, and one respecting felony, and which is stated by *Peer Williams* as an observation made by himself in the case of *Johnson and Ogilby*, does not seem warranted by the event of that case in which the point occurred.

There A. (appearing to be a single woman) and B. had some differences as to several freehold houses ; and, upon compromising those differences, it was agreed between them, that A. and B. should join in a fine and recovery, which should be as to two of the houses to the use of A. and her heirs ; and as to the other two houses, to the use of B. and his heirs. A fine and recovery were accordingly levied and suffered. After this A. pretended that she was, at the time of these transactions, a married * woman, and wife to C. Hereupon B. brought a bill against C. and his wife to discover whether she was married, when she levied the fine, and suffered the recovery, and to be relieved against the fraud. To this bill C. and his wife put in their answer, insisting on her being then a feme covert, and that she was not bound by such fine and recovery. Upon this B. preferred a bill of indictment against A. for a cheat, and for the fraud in levying a fine, and suffering a recovery as a feme sole, when at the same time she was under coverture. The indictment being found, upon not guilty pleaded, was brought to a trial ; but just before the trial was to come on, the parties came to an agreement, that B. should assign over his right to the premises, and that C. and A. should pay him 580*l*. Afterwards, the money not being paid, B. filed a bill for a specific performance. And the lord chancellor started the objection, that this agreement being to stifle a criminal prosecution, ought not, therefore to be executed in equity. In reply to which, *Peer Williams* states himself to have suggested the distinction before alluded. But it appearing by the reg. book that the cause coming on to be heard,

Johnson v.
Ogilby, et al.
3 P. Will. 279.

[* 194.]

Vide 3 P. Will.
4th edit. fol.
279 note 1.

[* 195.] *Ec.* his lordship declared, " the agreement * in the
" bill mentioned, was not such an one as ought to be
" carried into execution in that court, and that the
" plaintiff not praying a foreclosure, the bill, was dis-
" missed ;" it seems a necessary inference, that the
distinction taken was over-ruled.

Gould v.
Fleetwood,
Mich. 1732, at
the rolls, cited
3 P. Will. 251,
in note.

All bargains by trustees, made in behalf of them-
selves, and tending to eat up the trust property, are
discouraged in equity. Therefore, where an execu-
tor in trust, who had no legacy, and where the execu-
tion of the trust was likely to be attended with trouble,
at first refused; but, afterwards, agreed with the re-
siduary legatees, in consideration of one hundred gui-
neas, to act in the executorship; and; he dying before
the execution of the trust was completed, his execu-
tors brought a bill to be allowed these one hundred
guineas out of the trust money in the hands of the re-
siduary legatees, insisting, that the residuary legatees
might as well make a contract with the executor touch-
ing the surplus which was their own property, as the
testator himself; and that no harm could happen there-
by to the trust estate: The court said, that all bargains
of this kind ought to be discouraged, as tending to
eat up the trust; and that *here the executor * had died
before he had finished the affairs of the trust. Where-
fore the plaintiff's demand was disallowed.*

[* 196.]

Quere? If this
accident affects
the principle as
against trustees.

An agreement may be set aside by reason of a mis-
take in the parties making it, if the point misconceiv-
ed be the cause of the agreement; for, if an agree-
ment be entered into upon the presumption by one of
the parties of a fact, that is not really so as that par-
ty believes the agreement as to him is of no force;
because he did not give his assent to what is agreed
upon absolutely, but upon such and such conditions,
which are not verified by the event.

Lanndon v.
Lanndon,
Moseley 364.

Thus, where there were four brothers, and the sec-
ond died, and the elder brother entered upon his
lands, and the younger brother claimed a title, upon
which they applied to B. a schoolmaster, their neigh-
bour in the country (who often acted as an attorney)
for his opinion, who, upon consulting a book called the
Clerk's Remembrancer, gave it in favour of the young-
est brother, because lands could not ascend; upon
which the eldest brother agreed to divide the estate
with the youngest, and declared, he would rather do

so * than go to law, though he had the right. Deeds of lease and release of the moiety, were accordingly prepared by the school-master, which were executed by the eldest brother, and also bonds given in the penalty of 400*l.* which was computed to be the value of the moiety conditioned for quiet enjoyment of their respective shares. Then the youngest brother died, and the moiety descended to the defendant, an infant, his son and heir. And, on a bill filed to set aside these writings, the lord chancellor decreed, that the bond, and deeds of lease and release, should be delivered up to the plaintiff (the eldest brother) they having been obtained by mistake and misrepresentation, and that the defendant, the infant, should, when he came of age, convey *nisi*. [* 197.]

Upon the same principle it has been held, that if a party, at the time of entering into an agreement respecting a claim, capable of being precisely ascertained, be, at the time of contracting, ignorant of the precise value of it, but stipulates *under an idea*, and with an intent, that what he is to receive shall be *equal* in value to that which he has a claim to; this will furnish a sufficient ground to a * court of equity to set aside the agreement, if the thing to be received turn out not adequate to the price of the claim, when its value is accurately adjusted. [* 198.]

Thus, where one died intestate, leaving a widow and a daughter, the latter being of age, and they entered into an agreement concerning the distribution of the personal estate. A bill was afterwards filed by the husband and representative of the daughter, who was dead, to set aside this agreement, and to have a distributive share of the father's personal estate, to the amount of what his wife was entitled to. The mother insisted upon the agreement, as a defence against going into an account of the father's personal estate. But the court held, that the bill was proper, and the rights of the parties the same as when the wife was living. The question was, *what was in view on each side?* the daughter *clearly* did not *intend* at the time of the agreement, to take less than what by law she was entitled to, though what that amounted to did not clearly appear: But she *then* thought what was stipulated for her was *her full* share. It was a sufficient foundation, therefore, for a court of equity to interfere, in such case, if it

Cocking v.
Pratt, 1 V. & Z.
400.

[* 199.] * appeared that the personal estate amounted to considerably more than what she conceived, and the party suffering might apply to such courts to avail himself of want of knowledge of that fact, not, indeed, in the case of a trifle ; but the daughter here would be entitled to five or six hundred pounds more than was stipulated for, which was a material sum in a small concern, and a ground for the court to set it right. The daughter did not act on the ground of a composition, as wanting to marry, and to have ready money, but took what was agreed to be paid her as amounting to her *full* share of her father's effects ; and, if it appeared *not* to be so, the court could not suffer the agreement to stand. The estate, therefore, must be divided as the law directed, and the agreement set aside.

Ibid.

It is observable that, in the preceding case, the daughter's husband had ratified the agreement, and released to the mother : But as his intent was the same as the daughter's and he was equally in the dark, that was considered as making no difference in the equity.

Giffith v.

[* 200.]
Trapwell,
1 Vez. 401.

And, where one died intestate, leaving two sisters, one of whom got administration, and * prevailed on the other to accept of an agreement for her share ; and there was a further agreement that she should have a further share, reciting also, that it was intended that she should have an equal share, and that there should be a decree for that, which was accordingly had : it being afterwards discovered that the estate was a great deal more than it was then valued at, both the agreements, and the decree thereupon, were set aside on a rehearing.

Wide supra.
242—146.

We must be careful to distinguish cases of the nature last-mentioned, from those where the right or thing stipulated about is of itself doubtful, and no ignorance or want of information can be pretended respecting it ; for in cases of that kind, it is not necessary for a court of equity, after an agreement, if there be not a plain mistake, contrary to the intent of parties, shewn, to resort to the original right of the parties : "*That the right is doubtful,*" is a sufficient ground to support an agreement respecting it.

An agreement for sale of an estate, which, from the nature of it, when compared with the circumstances

of

of either of the parties to * it, furnishes decisive evidence of his being surpris'd, will be set aside in equity, although there be no surpris'e, fraud, or circumvention actually proved, and though a conveyance have been made pursuant thereto.

[* 201.]

Thus, where a steward, that had been for many years employed in the management of an estate, articulated with a person, employed by the owner thereof, to become the purchaser at 15,000*l.*; and by the articles it was stipulated, that he should either pay the whole in money, or might return lands to make up what he paid short in money of the 15,000*l.* Pursuant to these articles, the purchaser obtained a conveyance of part to himself at an under-value, alledging, that it was not material what sum was mentioned to be the consideration of the conveyance, in regard he was to make up the whole 15,000*l.* and had sold other parcels and paid the money, amounting to 4500*l.* as the vendor appointed, and would now return so much land as should make up the 15,000*l.* The court, on a bill brought by the vendor for that purpose, set aside the articles and the conveyance made to the vendee, except as to so much as he had sold to other purchasers; declaring, that they looked * upon the vendee but as an agent for the vendor, and one in whom he had reposed great trust and confidence, which the vendee had deceitfully abused; and that the articles themselves seemed to manifest surpris'e, the vendor having occasion to sell to raise money, and yet the articles left the vendee at liberty to pay as small a sum of money as he pleased, and return what of the lands he thought fit to make up the value. And this decree was affirmed on appeal.

Whorwood
v. Simpson,
2 Vern. 185.

[* 202.]

But, in the foregoing case, the court assumed to itself a greater latitude; because the vendor had elapsed the time prefixt by the articles, in which he was to make good the entire payment by money, or to return the lands.

Ibid.

Again, Where a lease for three lives came to a man's three daughters, as co-heirs and special occupants; there being a suit in Chancery touching this lease, the husband of one of the daughters, fearing to be in law, and being made to believe that he should be forced to pay costs, released the arrears that should be coming to him for his share of the rectory to the other

See v. Spenser,
1 Vern. 32.

[*203.]

other sisters, who were to *bear the charge of the suit : And his share of the arrears amounting to one thousand pounds, this release was set aside on the ground, that a misapprehension of the party should avoid it.

Vide *Meade v. Webb, Brow. Co. Par. 407.*
et vide *Broderick v. Broderick, 1 P. Will. 241.*

If, in *entering into* a treaty for an agreement, there be a wilful and industrious concealment of the truth in a material point by one party, in order to keep the other in ignorance, and to profit thereby ; that will be considered as a gross fraud, and be a ground, in equity, to set aside the contract ; especially if such concealment be accompanied with misrepresentation, and a premeditated intention to deceive : As if a man's agents, on a treaty for a lease, misrepresent the quantity of land proposed to be demised, to be one hundred acres more than what it really is ; and this misrepresentation being made in the presence of the principal, he, by not contradicting, in effect confirms the truth of what they say ; and it be in proof that this is done before the execution of the agreement, and at a time when the lessor has caused a survey to be taken, which ascertains the exact measure and limits of the premises, and yet he does not think proper to undeceive the lessee, but purposely conceals the true measure and quantity from him, this will be *a sufficient cause for a court of equity to set aside the agreement.

[*204.]

Vern. 60.

If a bill be brought for performance of a thing, for the non-performance of which a penalty is recoverable at law, the plaintiff must, by his bill, waive all benefit or forfeiture, or it will be a good cause of demurrer.

A court of equity will not suffer any advantage to be taken of a penalty or forfeiture annexed to an agreement, where the substance of the contract may be obtained, notwithstanding the penalty be not levied.

Strode v. Paraker, 2 Vern. 316. Holles v. Wyse, 2 Vern. 283. Nichols v. Maynard, 3 Atk. 520.

Therefore where, on a bill to foreclose a mortgage, it appeared, that the interest was, by the deed, agreed to be *5l. per cent. per annum*, payable half-yearly ; and if not paid by the space of two months after the time of payment appointed, then to be raised to *5l. 10s. per cent.* for increase of interest ; the interest being in arrear, the question was, at what rate it should be computed ? And it was decreed to be computed at the rate of *5l. per cent. per annum* only : For the increase of interest on non-payment at the day, operated in nature of a penalty, and therefore was relievable in equity.

Nor

* Nor will equity permit any advantage to be taken of a penalty or forfeiture, where compensation can be made.

[* 205.]

But, in cases where the covenant or agreement actually operates by way of penalty, the court, to avoid being arbitrary, will not relieve, unless in cases where it can give some compensation in damages, and where there is some rule to be the measure of those damages. And, therefore, if a lessee for years covenant not to aliene without licence of the lessor under penalty of forfeiting the lease, and afterwards assign or aliene without licence; equity will not relieve against this forfeiture, because there is, in such case, no rule whereby to measure the damages.

Wafer v. Maccato, 9 Mod. 112, 113a

So, where marriage articles provided, that, in case the husband did not, within two years after the marriage, settle such a jointure on the wife, as thereby was agreed to be settled, then the husband should only have the interest of the wife's portion paid him during his life; and the wife died within the two years, he not having settled the jointure, which by the articles he was obliged to settle: A bill brought by the husband to be relieved against * the articles, and to have the portion (insisting that if he at any time settled such jointure upon his wife, though not within the time prescribed by the articles, he would have been relieved against the articles, and have had the portion decreed him) was dismissed. The reason for which dismissal seems to have been, because no compensation could be made after his wife's death, since no jointure could then be settled on her.

Vernon 68, 69.
Vide supra.
19—21.

[* 205.]

So, where one by articles made upon his marriage was to receive 4000*l.* portion with his wife, viz. 1500*l.* in hand, and 2500*l.* more, if he made a settlement in the space of three years: The marriage took place, and the wife died within two months, and before the husband had made a settlement pursuant to the articles. And a bill exhibited by him to be relieved, was dismissed.

Colonel Cheek's case cited *ibid.*

Again, where one being employed by the *East India* Company as their chief agent in *India*, covenanted that he would not trade for himself, or any other, in several commodities, under penalty of so much *per* pound; and the penalties greatly exceeded the value of the commodities. The covenantor having purchased

Blake v. East India Company, 2 Chan. Ca. 198.
This case may likewise be supported on the ground

[* 207.]

that it was a national cause and concernment, and if not upheld, the company might have been ruined.

* purchased the prohibited commodities, the company sued for the penalty in an action of debt for 26,000*l*. The defendant filed his bill to be relieved; and though he proved, that it was for the benefit of the company that he so traded, for whatever he bought he sold to them at a just and market price; and that if he had not provided such goods, the company could not have been supplied; and that such dealings were necessary for the supply and benefit of the company, with other favourable circumstances, yet the bill was dismissed: The reason for which seems to have been, that no compensation could have been made, it being impossible to ascertain what damages might arise to the company from such trading, by the encouragement it would give to other people.

Equity will not relieve against an agreement, although from the terms of it, it seems to be in the nature of a penalty, if it be not really so.

Small v. Lord Fitzwilliams, Prec. Ch. 102.

[* 208.]

Thus, where A. sold an estate to B. covenanting against incumbrances, and particularly against his wife's dower. Afterwards B. * articked to sell to C. and in the articles it was agreed, that C. should retain 400*l*. of the purchase money in his hands for two years without interest; and if in that time, the wife of A. released her dower, C. was to pay the 400*l*. or else to retain it absolutely. A. died; his widow did not release her dower within two years, on the contrary, she brought her writ of dower, but died before a recovery of it. Then the vendor filed a bill to have the 400*l*. paid, urging, that it was but in nature of a penalty to secure against the dower, which was then at an end. But it was alledged on behalf of the vendee, and the court coincided in opinion, that the money retained here was not in nature of a penalty, but the retention was part of the terms of the agreement, and the measure of the satisfaction for the contingent incumbrance of dower. And as, had the wife recovered the dower, and lived several years, the vendee could have had only the 400*l*. and would not have been permitted, at least in equity, as assignee of B. to sue the covenant of A. against his own agreement in writing, which took notice of the dower, and the covenant and agreement to retain the 400*l*. as a recompense for it; so that the vendee

* vendee ran the hazard of her living, he ought to have the advantage of her dying. And no relief was given.

[* 209.]

So where, among other clauses and covenants in a lease of lands, in *Ireland*, for lives, renewable for ever, dated in 1719, there was one that the lessee and his heirs, with all their family, should, within one month from the commencement of the lease, live on the estate during the continuance of the lease, and of every other to be made pursuant to the intent thereof; and that, when he or they should fail so to do, the rent of 125*l.* 18*s.* 9*d.* therein reserved, should rise to the sum of 150*l.* and so continue yearly to the end of the then demise, and of any other demise thereafter to be made pursuant to the covenant for renewal, &c. In 1729 the lease was renewed. Then these leases were assigned, and the assignee in 1748 quitted the premises and never resided upon them afterwards. In *August* 1751 the agent for the head landlord demanded the increased rent of the assignee of the lessee, who freely paid it, being a year and a half's arrear; but, at demanding, on the 5th of *November* following, another year's arrear, the lessee refused to pay it: whereupon * the lessor distrained for it, and the tenant replevied, and the landlord avowed, and proceedings at law were going on for recovery of the rent. Then a bill was filed by the assignee to be relieved from this covenant, and, on his behalf it was urged, that this covenant for the perpetual residence of the lessee and his heirs, with all their family, was repugnant to the nature of the estates demised, contrary to reason, in restraint of natural liberty, and against the policy of the realm; that, if good in law, yet, being inserted only for the sake of improvement, and to secure the rent reserved, the same had been substantially performed, and the design thereof answered to the head landlord, as the lands had been always kept well stocked with more than sufficient to answer the rent; that the large fine paid by the under lessees shewed the lands to be of considerable value above the head landlord's rent; and that the additional rent was in the nature of a penalty, and relievable against in equity. But, on the other side, it was urged, that there was no ground for the interposition of a court of equity to prevent the question being tried at law, where it was disputable; and that the lessees should have established their titles there be-

Ponsonby v.
Adams, et al.
6 Bro. Par. Ca.
417. et vide
Rolfe v.
Peterson,
6 Bro. Par. Ca.
470.

[* 210.]

fore

[* 211.] fore they came * into a court of equity for relief; that, had the immediate lessee applied to a court of equity for relief against the covenant objected to, he must have been sent to law to try how far that covenant was or was not reasonable: For, supposing it unreasonable, unlawful, or waived by any act of those under whom the lessor claimed, all these were mere legal questions no way cognizable in equity; that the benefit was claimed as appendant to the inheritance, and, as such, being a matter of freehold, was triable at law only. But it was said, that the covenant in question was founded on the truest principles of law and policy. The former supposed the lessee resident upon the demised lands, manuring and improving them for his own and his landlord's benefit, whose rent arose from such industrious manurance and improvement of the tenant; that a clause of residence on the demised premises, with an increase of rent attending the failure, was not a penalty, like the forfeiture of a man's estate upon non-payment of a sum at a certain day, but was a mutual agreement for public benefit; the landlord letting his land at an easy rate, whence the tenant, by raising a comfortable subsistence for himself, would consequently * benefit the community by supplying it with the produce of that land: But, upon neglect of so important a consideration, he justly subjected himself to an advanced rent, as a compensation for the breach of both a private and public trust reposed in him by the landlord. And upon these grounds the bill was ordered to be dismissed.

Note. The question arose on an estate situate in Ireland, where, from disturbances, &c. no opportunity had been given

[* 212.] for improving the country by agriculture.

It was contended in the preceding case, that, as no demand for the advanced rent had been made from the commencement of the non-residence in 1748, until *August 1751*, although the head landlord and his alienees well knew of it; and, as he had accepted the reserved rent, given receipts for it in the usual manner without demanding any additional rent, and twice renewed the original lease without making any claim of the same, this acquiescence and these acts of the lessor amounted to a waiver of the penalty and covenant; especially as against the assignee, who was a purchaser for a valuable consideration, and ought not then to be resorted to. *Sed non allocatur*; this being part of the original agreement, which must continue as long as the lease, how often soever renewed, unless discharged by mutual consent.

Note. The assignees paying the arrears of increased rent, when demanded, seems to obviate any conclusion to be drawn from the lessor's omission previous thereto.

AGAINST UNREASONABLE CONTRACTS, &c.

* In all cases where an agreement is voluntary, and in favor of one of the parties ; the condition, although penal in its effect, will be binding on the favored party; if the agreement be not strictly performed.

[* 213.]

Thus, where a creditor agreed to take a sum of money less than his debt, so as it were paid precisely by such a day, and the debtor failed of payment ; a bill filed by the debtor, suggesting some equitable causes why he did not pay precisely at the day, and stating that he tendered the money a day or two afterwards, was dismissed as containing no equity.

Vern. 220.

† So, where a mortgagee lends money at five *per cent.* but agrees in the deed, that if the money be paid within three months after it becomes due, he will accept of four *per cent.* ; if the mortgagor does not pay the money within the time fixed, he will be decreed to pay the interest at five *per cent.*

† *Jury v. Cox.*
Pre.Chan. 160.
Bernard 481.
Nichols v.
Maynard,
3 Atk. 520,
et vide *Barrel*
v. Sabine,
1 Vern. 268.

Vern. 456.

And, where a father made a voluntary settlement on his eldest son, with a *proviso*, that if he did not pay to his younger brother 600*l.* at his age of twenty one, then the estate of the eldest son, both at law and in equity, * should cease, and, if the money was not paid, the father granted away the estate : The court would not relieve the son, in regard the conveyance was purely voluntary, and the father might put what conditions and restrictions he thought fit upon the eldest son.

[* 214.]

But, if (on an agreement by a creditor to take a less sum than his original debt, provided it be paid on a day certain) the original security be bettered by the addition of other persons added thereto ; it seems questionable whether equity will not relieve, on default of payment of the lesser sum at the time stipulated.

And equity will give relief against the penalties of bonds for performance of covenants, &c. and for that purpose such courts frequently send the parties to a trial at law, to ascertain the damages in a *quantum damnificatus*.

Vide 1 Sid. 445.

[* 215.] * OF THE PRINCIPLES ON WHICH COURTS OF EQUITY REFUSE TO INTERFERE IN CASES OF AGREEMENTS.

Vide Ch. Rep. 84, 85.

1 Vez. 447.
Armiger v.
Clerk, Bunb.
111. et 2 Eq.
Ca. Abr. 19.
Pl. 13, in note,
Cudd v. Rutter,
1 P. Will. 570.

[* 216.]
Vide Allport v.
Thomas Gilb.
Rep. Eq. 227,
et Dupins v.
Duke of Kingston,
there cited.

THE principle, upon which courts of equity retain bills for the specific performance of agreements, being, their having power to give a more complete remedy, and render more adequate justice, according to the intent of the parties, than courts of law; not by binding the interest in the lands, but by enforcing the party by *subpoena* to carry the contract specifically into execution; it is a general rule, that wherever a matter respects personal things, and lays merely in damages, *there* the remedy is at law only: As well because courts of law can give as full and effectual a reparation in such cases as courts of equity, as because the ascertainment of damages is the proper business of a jury, and cannot be adjusted by the conscience of a chancellor.

* But although, in cases where the relief may be as effectually had at law as in equity, the court will, if the agreement be denied and the relief demurred to, dismiss the bill; because the agreement must be established by a jury before it can be carried into effect, and, after it is established, lays in damages only: As, if a bill be brought on a covenant to pay a certain sum, and the deed is denied; yet if the relief be not demurred to, but the defendant answers (whether he denies the agreement or not) the court will decree thereupon on the hearing; because the defendant admitted the jurisdiction, by answering and putting the agreement in issue, and not demurring.

But in such case, if the agreement be denied by the answer, and be not proved in the cause by two witnesses, but only by one; the court will make an order to try it at law, and retain the case upon the equity reserved.

1 Eq. Ca. Abr.
17. 1 Bac. Abr.
69. Chan. Rep.
253.

Another exception to this rule, as to cases laying in damages only, is taken, where any matter of fraud is mixed with the damages; for this brings the case with-

in the *proper* * jurisdiction of a court of equity which will then retain the bill, and direct an issue to ascertain the damages upon a *quantum damnificatus*. As if A. bring an action of covenant at law for damages, and B. file a bill for an injunction, upon the equitable suggestion, that the covenant was obtained by fraud, there it A. file his cross bill for relief upon that covenant, the court will retain it; because the validity of the covenant is brought into dispute in that court, and on a ground properly cognizable there: And therefore, if the validity of the deed be established, the court will direct an issue to ascertain the *quantum* of the damages.

And, even where no fraud is *suggested*, if, from the nature of the agreement, a specific execution is necessary to *do effectual justice*, and answer the *substantial intent* of the parties; courts of equity will decree the agreement specifically, though otherwise, the proper remedy would be the recovery of damages: As if the contract be to perform something relating to personal things at several distinct times, or at a future period.

Thus, where A. assigned several shares of * the excise in *Ireland* to B. and B. covenanted to save A. harmless in respect of that assignment, and to stand in his place touching the payment to the king, and other matters that were to have been performed by him; A. in a bill filed, suggested that he was sued by the king for 20,000*l.* and that B. by agreement, ought to have paid it, and therefore prayed a decree against B. to perform the agreement in specie: It was objected, that this was no proper subject for equity, nor any thing that the court could decree; for here was no specific covenant, but a general and personal covenant for indemnity, which *founded only in damages*, and could not be ascertained in equity (especially in this case: there being no breach of the covenant assigned in the bill) for, a suit having been brought by the king, was not in itself any breach. But the Lord keeper decreed, that B. should perform his covenants, and directed it to be sent to a master; and that, *toties quoties*, any breach should happen, the master should report it specially, that the court, if occasion should be, might direct a trial on a *quantum damnificatus*: His lordship conceiving it conscionable, that B. should be decreed to clear A. from all these suits and incumbrances within a reasonable time.

[* 217.]

[* 218.]

Ranelagh v. Hayes,
1 Vern. 189.
S. C. 2 Chan. Ca. 146.
1 Bac. Abr. 69.
et vide Buxton v. Lister,
3 Atk. 383.
Nandene v. Wilkes,
1 Eq. Ca. Abr. 393. Pl. 5.
Moore v. Hart,
1 Vern. 201.
Et vide another exception infra, Dr. Bettsworth v. Dean and Chapter of St. Pauls.

So,

[* 219.]
 Taylor v.
 Neville, cited
 3 Atk. 384, et
 vide Duke of
 Buckingham v.
 Ward cited
 ibid.

* So, where a bill was founded upon articles for sale of eight hundred ton of iron, to be paid for in a certain number of years, and by instalments, a specific performance was decreed.

Again suppose, that two partners should enter into an agreement by a memorandum to carry on a trade together, and it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they were drawn one of the parties fled off, and a bill were filed : There could be no doubt, but that a court of equity would decree a specific execution, although the contract related to a chattel.

And it is observable, that in all cases of agreements respecting things real, where the bill is filed on behalf of the vendor, in which case the relief prayed is applicable to money only, courts of equity do nevertheless decree a specific execution : The principle upon which such courts govern themselves in this case is, that upon mutual articles there ought to be mutual remedies : but, if the vendee had a remedy both at law and in equity, * the vendor would not be upon a par with him, unless he also had the same remedies. Besides, the remedy the vendor has at law, is not a remedy adequate to that which he has in equity ; for, at law, he can only recover the difference between what he actually sells for, and what he agreed for, in damages ; whereas equity will give him the whole sum.

[* 220.]

Thus much having been observed, upon the general principles on which courts of equity retain or dismiss bills for the specific execution of agreements, upon matters apparent upon the face of them ; the next object of our attention seems to be, what circumstances, connected with, or arising out of the contracts themselves, will be a reason for refusing the aid of the court upon the general merits. And in the pursuit of this enquiry I shall consider,

First, What circumstances furnish a ground, for courts of equity to refuse interfering in cases of agreements. And,

Secondly, What circumstances have been considered

*sidered as not furnishing a ground for courts of equity to refuse the exercise of this power in such cases.

[* 221.]

On the first of these heads of enquiry, it is observable, that courts of equity, having necessarily a discretion, (not an arbitrary discretion, but a discretion founded upon certain grounds, and governed by fixed rules of equity) in the exercise of their jurisdiction, in making decrees for carrying contracts into execution in specie; because, were it otherwise, they might be obliged to make decrees tending to the ruin of one of the parties to a contract, which would be repugnant to the end of their institution: Therefore no rule is better established than, *that every agreement, to merit the interposition of a court of equity in its favour, must be fair, just, reasonable, bona fide, certain in all its parts, mutual, useful, made upon a good or valuable consideration, not merely voluntary, consistent with the general policy of a well-regulated society, and free from fraud, circumvention, or surprize; or at least such agreement must, in its effect, ultimately tend to produce a just end. If any of these ingredients are wanting, or that object be not in* * view, courts of equity will not decree a specific performance.

[* 222.]

Therefore, if there be any concealment of a circumstance disadvantageous to one party to an agreement, by the other, so as to lead the former into a misconception; *that*, when suggested and proved, will be a solid objection to decree a performance in specie.

Thus, where the defence to a bill, for compelling the execution of an agreement for purchase of an estate, and payment of the purchase money, was, that the estate had been represented to the defendant, as clearing a neat rent of 90*l. per annum*, and no notice had been given him of the necessary repair of a wall to protect the estate from a river, which would occasion an outgoing of 50*l. per annum*; and it appeared upon evidence that there had been an industrious concealment of this circumstance during the treaty: The court dismissed the bill.

Shirley v. Stratton,
1 Bro. Rep.
Chan. 440. et vide Young v. Clerk, pre.
Chan. 539.
Rochfort v. Creswick, 2 Bro. Par. Ca. 96. Vin. vol. v. 553 Ca. 34.
Fran. Max. Eq. 6.

Upon the same principle of unfairness *misrepresentation* is held a good objection to a specific performance.

Buxton v. Lister, et al.
3 Atk. 583.

[* 223.]
et vide Brece-
ton v. Cowper,
2 Brown's par.
Ca. 535. et
Frank v.
Frank, *infra*,

ance. Therefore, where an * agreement had been made for the sale of timber trees, and a bill instituted to carry it into execution, it was objected that there had been *misrepresentation*; for the purchaser had been induced to give 3050*l.* for the trees, by being told by the vendor, that two timber merchants had valued it at 2800*l.* which he said " was true upon his honour, and that when he said upon his honour the vendee ought to believe him ;" when, as it came out, the timber merchants, upon whose judgment the vendee bought, did not set any greater valuation than 2500*l.* upon the timber : Lord *Hardwicke* thought this such an ingredient in the contract, as should induce the court not to decree a specific performance.

Per Lord
King,
1 Vern. 229.

So, no equity would arise, if the misrepresentation were, as to the identical *person* on whose behalf the contract was entered into. And, therefore, if one, being about to sell an estate, should be informed by A. that the vendor's brother desired to be the purchaser : and, thereupon, the vendor should declare, that his brother should have a better pennyworth than another person, and should article with A. for the sale of it at an under value : If it should turn out that the purchase was in truth * made for a stranger, equity would not decree an agreement so procured to be executed in specie.

[* 224.]

Philips v.
Duke of Buck-
ingham,
1 Vera. 227.

And in the case of *Philips* against the Duke of *Buckingham*, which arose on an agreement between Lord *Nottingham's* secretary and the Duke, who was led by him to conceive that he was treating for Lord *Nottingham*, or for his son ; and thereupon declared himself willing to oblige any of that family, and said, that if the chancellor would take any way to satisfy himself of the value, he should set his own price ; but it turned out, that in truth, the chancellor's secretary was employed for the plaintiff, who had formerly been in treaty with the Duke, which was broken off on a disagreement in price ; and the duke, afterwards discovering this deception, refused to proceed in the sale, and a bill was filed to compel him to execute the agreement : The lord keeper said, that there not having been fair and open dealing in managing the affair, and the duke appearing to have been misinformed and drawn in, he would not, in equity, carry it into execution for the benefit of a stranger ; and dismissed the bill.

Buc

REFUSE TO INTERFERE WITH CONTRACTS, &c.

* But in the last case the Lord Keeper declared, [* 225.] that if the bill had been brought in the name of the Lord Chancellor or his son, and he would have patronized the purchase, the articles must have been decreed.

And where, by a fortuitous concurrence of circumstances, a misconception arose, without any actual misrepresentation or deceit, and the sale of an estate by auction was hurt by the act of an agent for the vendor in conjunction with the vendee; the Master of the Rolls considered that as a ground to refuse the interpositions of the court to carry the agreement into execution, although he did not deem it a ground to set it aside.

The material facts of the case above alluded to were these. A. B. and C. (trustees under a will for the sale of estates) put them up by auction. Previous to the sale it was agreed, that the first lot should not be sold under a certain price; but if that was sold the rest were to go at what they would fetch. The agent for the vendor attended, and was acquainted with this arrangement. He being an attorney, a client of his came up to him, and directed him to bid for him, which he * did, and the first lot was knocked down to him at the price fixed. The others were also bought by him. The principal part of the estates turning out afterwards to be freehold, and not copyhold, as supposed, the trustees refused, to complete the contract; and thereupon a bill was filed by the vendee to have a specific performance, and another bill by the trustees to set aside the contract. And Sir *Lloyd Kenyon*, then Master of the Rolls, was of opinion, that although no fraud was imputable to any of the parties, yet, as by an inadvertent act, the agent for the vendor was in a situation that hurt the sale, and was put in that situation by the vendee, it was therefore not such a case as he could decree to be specifically carried into execution, though he would not set the contract aside. He, therefore, dismissed both bills, leaving the parties to their remedies at law.

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If a contract be entire, and inequitable in part, equity will not apportion relief. Therefore, where one, upon the loan of 90*l.* had got a bond from the borrower of 1600*l.* conditioned for payment of 800*l.* and judgment thereupon; and the latter was in right of his wife entitled to certain lands, of which other

Twining v. Morrice,
Taggart v. Twining,
Brown's Rep.
Chan. 1788.
fol. 316.

[* 226.]

Rich v. Sydenham, 1 *Chan.*
Ca. 202.

[* 227.] * other persons were seised in trust for her: The court would not, on bill for that purpose, subject those lands to the satisfaction of the obligation; because the security was gotten when the *obligor* was drunk, and therefore the Lord Keeper would not give the obligee any relief in equity, not so much as for the principal he had really lent.

An agreement, unreasonable, exorbitant, and made with a person of weak intellects, although in part executed, will not be specifically decreed.

Edwards v.
Meather, Sel.
Ca. Ch. 3. et
vide 2 Brown's
Par. Ca. 415.
428. Max. Eq.
5, 6.

Thus, where A. sold B. a copyhold estate of the yearly value of 16*l.* on which there was timber to the value of 150*l.* for 630*l.* and covenanted to surrender it on or before the ensuing *Michaelmas*; and B. paid 10*s.* in part of the purchase; entered on the premises, cut down timber, stocked the land; and acted as owner. A. proved he had given notice in writing, that he would surrender next court day, and attended accordingly. On the behalf of B. there were several proofs that he was disordered in his senses, and it was alledged, that as no custom was shewn whereby the tenant was authorized to cut timber, it must * be considered that, according to the common law, he had no such power, and therefore a plain imposition. And the chancellor being of opinion that here was a great over-value, and that the vendee's cutting down timber was a proof of his folly; because a direct forfeiture; and also observing, that it was a matter merely at law, as, if the surrender had been had, an action would have laid, dismissed the bill.

[* 228.]

But exorbitancy of price, uncoupled with circumstances of fraud, has not yet been determined to be a ground, for the court of Chancery to refuse its interposition on behalf of the vendor of an estate.

Keen v.
Stukely, Gilb.
Rep. Eq. 155.

The first case that occurs of this kind is that of *Keen* and *Stukely*, which arose in the court of Exchequer, on a bill filed to compel the specific execution of an agreement for a sale of land at forty years purchase, which was decreed accordingly in the court of Exchequer: but on appeal to the lords, this decree was reversed on another ground, which will presently be stated.

But although exorbitancy of price has not yet been held

* held a ground to refuse the interposition of a court of equity, to decree the execution of an agreement free from any imputation of fraud practised upon the opposite party; the reason for which seems to be, that laying aside all fraud and institutions of positive law, it is the consent of parties alone, that fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value; and that, therefore, a man is obliged in conscience to perform a contract which he has entered into, although it be a hard one: Yet a court of equity will not decree a specific execution of a bargain, having this quality imputable to it, unless the party applying for its assistance be capable of performing strictly whatever is stipulated to be done on his part. For, in such cases, those courts, considering a bargain as an entire thing, which ought to be performed *in toto* on both sides, or not performed on either; and that the party calling for its aid in a case of hardship has no ground to require it, when he himself cannot perform his bargain, unless he be permitted to discharge it in part by compensation, assume a discretion to refuse interfering. Upon this principle the House of Lords, in the beforementioned case of *Keene and Stukely*, * reversed the judgment of the court of exchequer; because, by the agreement, the vendor stipulated that he would, on or before the 29th of *September* then next ensuing, at the proper costs and charges of the vendee, make to him, his heirs, and assigns for ever, a good estate in fee simple, to the satisfaction of the appellant and his counsel; and the title could not be proved to have been made out by that time, by reason of a slip in form; without which being done, the vendor could not entitle himself to the purchase money.

So, where the plaintiff, in a bill for specific performance, agreed to sell his manor and lands to the defendant, by a particular or rental, wherein the manor and royalties were mentioned, but no value set upon them therein; and it happened that the plaintiff had no title to the manor, but had been in possession of the royalties for several years: It was objected, First, that the contract was at the rate of forty six years purchase, which was an exorbitant price; and, Secondly, That though no value was set upon the manor and royalties in the particular, yet they were valuable in themselves; and that therefore, since the plaintiff

[* 229.]

[* 230.]

Hanger v.
Eyles, 21 *Vin.*
Ab. 540, Pl. 1.
2 *Eq. Ca. Abr.*
20, Pl. 16. ₄

[* 231.]

could not perform his part of the *agreement, by conveying the manor, he ought not to have the aid of a court of equity to compel the defendant to pay the money, since the defendant could not have the full benefit of the agreement: And upon this ground the bill was dismissed, although it was acknowledged that the manor was of little or no value.

Micks v.
Philips, Fre.
Chan. 575.
et vide 2 Chan.
Ca. 17.
Max. in Eq.
5, 6.

So, where lands, of 180*l.* value yearly, were bargained for at thirty-five years purchase, and the vendor covenanted to convey freehold, and about thirty acres proved to be copyhold; the court of Chancery, this being then deemed an exorbitant price, refused, on a bill for that purpose, to decree a specific performance, even though the vendor offered to procure an enfranchisement of the land, or to make any compensation in the price: For, *per curiam*, this is a case proper for a jury at law to consider of, who may mitigate the damages according to what the circumstances shall appear to be; but a court of equity can take no advantage of such circumstances, but must either decree an execution of the agreement or dismiss the bill. And, therefore, as the plaintiff cannot perform his part of the agreement, because part of the lands being *copyhold cannot be conveyed within the meaning of these articles, the words thereof being all of them proper for conveyances at common law only, the plaintiff ought to be left to make the most of it he can at law, and not aided by a court of equity.

[* 232.]

Thompson v.
Harcourt,
2 Bro. Par. Ca.
415.

But, if a contract be upon equal terms at the time at which it is entered into, however unequal it become at a future period on subsequent circumstances, a court of equity will nevertheless carry it into execution. Therefore, where, during the execution of the South Sea scheme, A. agreed with B. to pay him 92*l.* *per cent.* for South Sea stock, the court of Chancery, although that stock fell, between the time of entering into the contract and performing it, to par, decreed it to be carried specifically into execution; and that decree was affirmed on appeal to the House of Lords.

Upon the same principle, if A. were bound to transfer stock, on or before such a day to B. and A. suffered the time to elapse, and then the stock rose; A. would still be obliged to transfer so much stock in specie, at the price it bears, and to account for all the dividends

REFUSE TO INTERFERE WITH CONTRACTS, &c.

* dividends from the time at which it ought to have been transferred. [* 233.]

That an agreement is not made *bona fide*, is considered, in equity, as a good objection to its being carried into execution in specie. Therefore, where one failing in his trade, compounded with his creditors at so much in the pound to be paid at the time therein mentioned; and, he having failed in payment at the precise time, some of the creditors refused to stand to the agreement; the court, on a bill for a specific performance, would not decree an execution specifically, it appearing in the cause, that the trader, to draw in the rest of the creditors, had made an underhand agreement with some of them to pay them their whole debts, though apparently they were to accept of the composition; which was a fraud and deceit on the rest of the creditors.

Again, uncertainty and want of mutuality are decisive objections, in equity, to the specific execution of an agreement.

Thus, where A. settled a manor on trustees, to be by them sold after his death, and * directed the money thereby arising to be disposed of as in the settlement mentioned, &c. with a power of revocation; and afterwards A. on the marriage of B. with one of his daughters, covenanted, that, if B. survived him, and had issue by his daughter, he should have the manor for 1500*l.* less than any other purchaser would give for the same, and A. afterwards revoked the settlement, and disposed of the land to other uses than those therein: The court, on a bill filed for a specific performance of the covenant, refused, upon the hearing, to decree it; first, on the ground of the uncertainty of it, because if the estate was not to be sold, but B. was to have it, it was not practicable to know what a purchaser would give for it. Secondly, because it was not mutual; for B. was not *bound* to take it at any price, and, as the covenant was worded, if B. had died in the life-time of A. the covenant would have been of no effect.

But it is sufficient, if there be mutuality at the time the agreement is entered into. And therefore, in the before mentioned case of *Stapilton* and *Stapilton*, where an agreement was had between two brothers, the

Child v.
Danbridge,
2 Vern. 71. et
vide Small v.
Brackley, infra.

Bromley v.
Jefferies,
[* 234.]
2 Vern. 415.
et vide Gilb.
Chan. 242. et
Hall v. Butler,
Eq. Ca. Abr.
29. 7.

Stapilton v.
Stapilton,
1 Atk. 19.

[*235.]

+ *Pre. Ch.* 444.

‡ *Benfon v. Benfon*, 1 P. Will. 130.
Short v. Wood, ibid. 470. et vide *Gosmer v. Paddifon*, 2 Vent. 353.
S. C. 2 Vern. 48. Et note, Distinction between money and land so circumstanced.
 Note Lord King in *Eyres's case*, 3 P. Will. 13; and afterwards in *Mr. Quilow's*

[*236.]
case, cited ibid. et 3 P. Will. 8. refused to make such decree in favor of tenant in tail, with remainder in fee in himself, on the ground that a fine was a thing that took up time; but, notwithstanding this, Lord Parker's rule in *Short and Wood*, consonant to the principal case, has been generally followed, and is now the law. These cases seem to be founded on the ground, that the statute de Donis does not extend to

the elder of *whom was supposed to have been tenant in tail under an old settlement, but, in fact, was not so, being illegitimate; after the agreement entered into the elder died; it was objected on a bill filed by his heir for a specific execution, that it was not mutual and equal, for that an alteration as to their mutual benefit had happened by the death of the elder; it being said, that, if the elder had been legitimate, his heir (the plaintiff) would not have been compelled to suffer a recovery, because the issue in tail was not compellable to perform the covenants of his ancestor, tenant in tail. But Lord *Hardwicke* observed, on this objection, that during both their lives, the benefit and objection was mutual, and the elder would have been equally compellable to suffer a recovery with the younger; and, the chance being at first equal which died first, it would be hard to say, that the act of God should hinder the agreement from being carried into execution.

A court of equity will not make a decree that will be vain and nugatory; and, therefore, will not direct any thing to be done that must be useless. It is, consequently, a rule of equity, that † if money be devised to be laid *out in the purchase of lands to be settled on one of his heirs, the person, for whose benefit the purchase is to be made, may come into court, and pray to have the money itself, and that no purchase may be made: Because no one has an interest in it but himself.

And the same rule prevails in equity, where the applicant is tenant in tail of money, if the remainder in fee be limited to himself.

‡ Thus, where 2000*l.* were, before marriage, agreed by articles to be invested in a purchase of lands, to be settled to husband and wife for their lives, remainder to the heirs of the body of the wife by the husband, remainder to the heirs of the husband; the husband received the money, then the wife died, leaving a son and three daughters, and afterwards the husband died intestate: Then the eldest daughter took out administration to her father, and the son instituted a suit against her to have the money paid to him, electing that it should not be laid out in land. It was objected, that this might be a prejudice to the sisters, who, if the lands were to be settled, and afterwards the

the son should die without * issue and without levying a fine, would be entitled to them under the contingency; and it was said, there could be no reason to deprive the sisters of that contingency: But the court said, that a fine could not be levied of money agreed to be laid out in land to be settled in tail, but a decree would bind such money equally as a fine would have bound the land, if bought and settled; and, in regard the son would have the entire interest in the land when purchased and settled, and the absolute power over it, and that a court of equity would not decree a vain thing, namely, a purchase and settlement to be made, which the son the next moment by a fine only, which might be levied in vacation time as well as in term, might cut off, it was decreed, that the son should have the 2000*l.* and the administratrix be indemnified.

† And, if a feme covert is interested in money articulated to be laid out in land and settled, she may, by coming into court and consenting, give effect to a disposal of her interest. So, if the party applying for the money were married, and his wife, consequently, entitled to dower; it would, *without doubt*, be expected, * that the wife should appear in court, and give her assent to the husband's receiving it.

But a release by husband and wife (the wife being entitled to an estate in tail in lands purchased with money so circumstanced) to the trustees of the land, will not bind her interest therein.

Therefore where, in consideration of a marriage, 500*l.* was agreed to be laid out in the purchase of lands, to be settled to the use of the husband for life, then to the wife for life, then to the child or children to be begotten by the husband on her body for such estate, and in such proportion, &c. and in default of issue, to the husband, his heirs, and assigns forever; they had issue one daughter, who married A. There was no appointment, and the trustee paid the 500*l.* to A. and his wife, who received it as money, and gave a release. A bill was afterwards brought by a daughter by a second marriage against A. as representative of his wife, to have the money as land. And one question was, whether the acts done by A. and his wife were sufficient to vest the money in them *qua* money. *Et per Lord Hardwicke,* certainly

[* 237.]
them, being entails under agreements, and, consequently, mere creatures of a court of equity; which holds, that the person that is master of such an interest shall, in equity bind it by bargain and sale, or the like without fine; because no injury is thereby done to tenant in tail; as a fine would not require more time, or give him a better chance; But as a recovery takes up time, the court will not
[* 238.]
take that advantage from the remainderman, by suffering his interest, even in an equitable estate, to be barred by a more expeditious process.
† 3 P. Will. 14.
Cunningham v. Moody.
1 Vez. 174

- [* 239.] * certainly A.'s wife was tenant in tail, reversion in fee, in a moiety to herself, and, therefore, if she had been *sui juris*, and had brought a bill for the money, a moiety would have been decreed to have been paid to her, and the other moiety been decreed to be put out at interest to go as the profits of the land would have done. But here she was a *feme covert*, and then the rule is, that, although she has the reversion in fee of the whole, it shall be laid out as directed, unless some further act be done, by her coming into the court to be solely and separately examined, analagous to the form of a fine at law : And, in such case, if she, without the influence of her husband, declare her consent to have it in money, the court will decree it so ; and if she is in the country, and cannot come, there will be an order in the nature of a *dedimus potestatem*, to examine her there, which will take up time. The payment of the money, therefore, to them in the principal case, she not being *sui juris*, is not equal to a decree of this court, nor is the release sufficient to cause it to be taken otherwise than as land, not being equal to a fine, or sole and separate examination, declaring her free will. Nor can it change the equitable * quality this money has gained, of being considered as land.
- [* 240.]

Vide 1 P. Will.
90, et ibid. 389.

And if tenant in tail, with remainder in fee in himself of money so circumstanced, were an infant, the court probably would not decree the money to be paid to him because, during his infancy, no fine could be levied, and he might die before he came of age.

Vide Legate v.
Sewell, 1 P.
Will. 807.
Caldwell v.
Shadwell, cited
ibid. 485. et
vide ibid. 471.

Formerly the practice of the court of Chancery was, to make a similar decree upon a bill preferred by tenant in tail, with remainder over to *another* or *others* ; and so it stood until the case of *Caldwell* and *Shadwell*, wherein Lord *Cowper* decreed the trust money to be laid out in a purchase of land, and settled on the first tenant in tail, remainder over in tail ; to the intent that the remainder-man might have the benefit of the chance intended him by the person creating the trust, in case the tenant in tail should die before suffering a recovery to bar it, which required time, and could not be done in vacation : And the accident of the death of tenant in tail in this case, before a recovery suffered, shewed the remainder-man's interest in so glaring

2 Vez. 176.

glaring a light, * that it has established the precedent [* 241.] ever since.

But still where there is tenant in tail, remainder in fee in another, the court will decree the money to be paid them, if they agree together upon dividing it.

Thus, where 8000*l.* was devised to be laid out in land, and settled to the use of B. in tail, remainder to C. in fee, B. and C. agreed by articles to divide the money in the manner therein mentioned: and soon after the entering into the articles, and before they were executed by a division of the money, B. the tenant in tail, died without issue: And, on a bill filed for that purpose, a specific performance of these articles was decreed at the Rolls, in favor of the executor of B. and that decree affirmed afterwards on appeal to the chancellor.

But the principle upon which courts of equity proceed in these cases, being the right of the remainderman to the chance of what the time necessarily taken up in suffering a recovery may produce, they do not regard whether the purchase be *bona fide* or not, if the main object be answered; and, therefore, * where money was articulated to be laid out in land, and settled on the first and *other* sons in tail, the court of Chancery, in order to preserve the chance to the second son, would not decree the money to the eldest son, but ordered the same to be invested in a purchase pursuant to the articles; whereupon the eldest son got one to lend him a purchase, and to settle it, with an intention forthwith to suffer a recovery, and to reconvey the estate back to the seller; yet the purchase, though all this appeared by the master's report, was allowed.

It is a good answer to a bill in equity for an execution in specie, to say, that the agreement upon which it is founded is merely voluntary, and without consideration. The reason is, that a court of equity, *unless in particular instances that furnish exceptions to the general rule* upon its own particular principles, never decrees a specific execution of an agreement, unless it be such an one whereupon *real damages* might be recovered at law. And, although there be, as we have seen, a distinction at law between a bare agreement, and an agreement or covenant under hand and seal, having the solemnities of a deed; inasmuch

Carter v. Carter,
Ch. T. Talbot
271.

—v. Marsh;
Easter Term,
1723. V. de
1 P. Will. 485.
in note.

[* 242.]

1 Vez. 450. 74.
Brownsmith
v. Gilborne,
Strange 738.
1 Atk. 10.
Vide *supra*.

[* 243.]

as in the latter case, the contract * will support an action at law, though without consideration, the form of the instrument being rather considered there than the cause of its being made : Yet as, at law, a covenant, so circumstanced, would recover only mere nominal damages, as a shilling, or the like, courts of equity, that attend to the substantial consideration, and found their jurisdiction on that, and do not notice matters of so slight a value, refuse their interposition in the latter instances, as well as in the former.

Furaker v.
Robinson, 1 Eq.
Ca. Abt. 123.
S.C. Pre. Chan.
475. Gilb. Eq.
Rep. 139.

Therefore, where a man covenanted to convey his copyhold to his bastard daughter, and to make further assurance, and she was admitted accordingly, but without a surrender, whereby the copyhold did not legally pass, and then the father died ; a bill brought by her against the heir at law of her father to supply the defective conveyance was dismissed : Because the daughter was, in consideration of law, a mere stranger, being *nullius filia*, and then, there being no consideration for the conveyance, it was merely voluntary, in which case a court of equity, it was said, had no foundation to decree against the heir.

[* 244.]

Per L. Keeper,
Coventry,
9 Mod. 132.
vide 2 Vez.
671. A strong
case in favor of
children as pur-
chasers under
articles.

* Where a settlement or articles are made by the father, or other lineal ancestor, in consideration of the marriage of his son, &c. all the remainders limited to his children and their posterity, are within the consideration of that settlement, or those articles : But where the settlement or articles are made by a brother, or other collateral relation on his intermarriage, then, after the limitations to his own issue, all the remainders limited to his collateral kindred are voluntary, and not within the consideration of the marriage settlement or articles.

Billingham v.
Lowther,
2 P. Will. 249.
1 Ch. Ca. 243.

Thus where L. on his marriage with B. covenanted to settle certain freehold lands to the use of himself and his intended wife for their lives, remainder to the heirs male of his body by her, remainder to his brother in tail, &c. and to settle copyhold estates to the same uses ; but died before any settlement was made, and on his road to surrender the copyhold : it was held, on a bill filed by the brother, to have this covenant executed by the heir at law as to the copyhold ; that, as to the brother, it was voluntary, he being no party to the articles, nor within the consideration of the marriage

marriage * or marriage portion ; and that a voluntary conveyance to a younger brother ought not, if defective in law, to be made good in equity against the heir. And the bill was dismissed. [* 245.]

But, although the rule, that no one can come to a court of equity for a specific performance, who does not come under the consideration of the agreement, still holds good ; and consequently, a specific performance is not now decreed for the benefit of collateral branches in marriage articles ; yet as agreements are entire, and the several branches of the family may have been in view of the parties at the time of their being entered into, courts of equity have, in later cases, laid hold of any circumstances, that afford a ground to distinguish them from the cases already decided on that head, still adhering to the rule, where such circumstances do not occur.

Upon this principle, if any kind of consideration can be collected from the terms of the contract, the court will lay hold of it to support the claim of remote remainder-men.

Thus, where A. seised in fee of lands, had issue * two sons, B. and C. and one daughter D. married to O. and several other sons and daughters ; and, upon the marriage of B. he settled part of his estates upon B. and his wife, and the issue male of the marriage, with a power, if there should be no issue male, and but two daughters, to raise 1300*l.* thereupon. B. and his wife died without issue male, leaving two daughters ; A. the father, afterwards settled the estates to several uses, with power of revocation, but subject to the charge for his grand-daughters. Afterwards A. by indorsement revoked these uses, and limited a new use to his son C. in fee, but the father continued in possession ; then A. paid the two daughters of his eldest son 650*l.* apiece, making 1300*l.* being their portions under the first settlement, and took a receipt from each of them in writing. Afterwards, on a treaty of marriage between C. with P. in consideration of the intended marriage, and 600*l.* portion paid to C. both A. and C. by marriage articles, covenanted to convey, within a month after the marriage, the said estates to trustees and their heirs, to the intent that P. the intended wife, should have a rent-charge of 60*l.* per annum for life for a jointure, and that A. should have

Osgood v. Strode, et al.
[* 246.]
2 P. Will. 245.
S. C. 10 Mod.
533. *Stephens v. Trueman*,
1 Vez. 73.

- [* 247.] a rent charge of 50*l.* *per annum* for life; and that*the estates should, subject thereto, be settled on C. for his life, remainder to his first and other sons in strict settlement, with a provision for daughters, remainder to E. a grandson to A. by another deceased son (since dead without issue) and his heirs male, remainder to his grandson F. son of his eldest daughter, and his heirs male, remainder to the right heirs of A. the father. A died before any settlement made, the wife of C. died without issue, then C. died without issue, having devised the estates to his heirs at law. And, on a bill filed by F. against the heirs at law, as well of A. as of C. to have a performance of these articles in specie, it was objected that, although the limitations in the articles, to C. and P. and their issue, were all on a valuable consideration, having been stipulated for by the friends of the wife, or by the wife, in consideration of the marriage; yet, the subsequent limitations, and, among the rest, that to F. were merely voluntary, and out of the consideration of the marriage or portion, being purely the bounty of him from whom the estate moved; and that it had been often determined, that one and the same settlement might be on good consideration in part, and voluntary and fraudulent as to the rest, and so * might articles be. *Sed per* Lord *Macclesfield*, Chan. the marriage and marriage portion supported only the limitation to the husband and wife and their issue; this was all that was presumed to have been stipulated for by the wife or her friends; but, by the appointment of the estate by A. by the indorsement, to his son C. in fee, which gave C. the legal estate, and also by A.'s having paid to his two granddaughters their portions of 650*l.* each, and taking their receipt for the money, he obtained an interest in equity in the estate, or at least, a trust for the raising 1200*l.* upon it; and it could not be intended but that there was some trust between A. and C.; for, that the former would not otherwise have parted with all he had in his life-time to C. and this was rendered still clearer by his continuing in possession after his appointment to his son, and by his son's submitting to accept such limitations as were made him by the articles; wherefore each of them, *viz.* A. and C. having an interest in the premises, so that the one without the other could not make a settlement thereof, here was now a proper person for A. to stipulate with, namely C. his son, that he (A.) would come into those articles
and

[* 248.]

and join therein, on condition that the * estate should, [* 249.]
in case of C.'s dying without issue of that marriage,
and E's dying also without issue male, then go to F.
And this probably was part of the marriage agree-
ment, and of the terms on which it was made, though
the leaving out the sons of C. by any other marriage,
might be a mistake. And, therefore, since this might
be, and probably was, nay appeared to have been, the
terms of this marriage agreement, and the inducement
to A. to join therein, equity ought to decree a per-
formance of it, and the decree, carrying the articles
into execution, was afterwards, on rehearing before
Lord King, affirmed.

So, where, in consideration of a marriage to be had
between F. N. and L. a daughter of S. who was his
second wife, O. N. S. N. and F. N. agreed to settle
their estates in manner following. The estate of O. N.
was to be settled to the use of himself and his intended
wife for life, remainder to the first and every other son
and sons of the body of the said O. N. on the body of
L. his intended wife to be begotten, with several re-
mainders over, remainder to the right heirs of the said
O. N. for ever. And S. N. agreed to settle his estate
to the use of himself for life, * and after his decease to
the use of O. N. and L. his intended wife for life, re- [* 250.]
mainder to the sons of that marriage in tail male &c.
and F. N. agreed to settle his estate to the use of him-
self and his wife for life, with like remainders to the
sons of O. N. in tail. And pursuant to this agreement
the estates of O. N. and S. N. were settled to these uses.
And F. N. in order to keep his estate in his *name and*
blood, and in consideration of the marriage, and of the
natural love and affection which he did bear to his
cousin O. N. and in consideration of *5s.* covenanted for
himself and his heirs to stand seised, &c. to the use of
himself for life, remainder to his wife for life, remain-
der to the first and other son and sons of the said O. N.
in tail male, remainder to the right heirs, of O. N. for
ever. And for the consideration aforesaid, he cove-
nanted *for himself and his heirs to surrender* his copy-
hold lands to the same uses, *before Michaelmas follow-*
ing. F. N. and his wife died, and a bill was brought
by the daughters of O. N. against his heir at law, to
have a specific performance of the aforesaid covenant,
he having bound himself and his heirs to perform the
same. It was objected, that the plaintiffs, being the
daughters,

Neeve v.
Keck, 9 Mod.
106.

[*251.] daughters of O. N. were not likely *to continue the estate of F. N. in his name, nor were they within any of the considerations of the settlement; that, therefore, in respect of them, the covenant stood merely on the foot of a voluntary conveyance, which a court of equity would not carry into execution. But the court was of opinion, that there were several considerations in these settlements, sufficient to raise and support the uses of them: First, it was probable, that O. N. would not have settled his own estate in the manner which he had done, but in prospect of the estate in question, for by that settlement, there was no provision made for younger children; so that if there had been a son of the marriage, the younger children would have had nothing: Secondly, that O. N. who married the daughter of S. was made richer, and that might be a consideration for settling his estate as he did, and the widow of F. enjoyed this copyhold during her life by virtue of this covenant, by which her husband had bound this estate. And the court decreed a surrender pursuant to the covenant.

[*252.] Another circumstance that has been laid hold of by courts of equity, to take cases out *of this rule is, that the agreement is such as that an action may be brought thereupon in the name for the trustees for the recovery of damages; for then, as that remedy may be had at law, the ground upon which a court of equity refuses to execute a voluntary agreement, namely, that nothing can be recovered upon it at law, fails. The court therefore, being capable of giving a remedy more complete, and without the circuitry of going into a court of law, enforces such an agreement; as being attended with circumstances that make it an exception out of the general rule, and bring it within the ordinary course of proceeding of the court.

† *Vernon v. Vernon*, 2 P. Will. 594.
S. C. 1 Eq. Ca. Abr. 28. Pl. 33.

† The leading case upon this distinction is that of *Vernon against Vernon*, which was a bill for a specific performance of marriage articles, whereby A. covenanted to purchase lands of the value of 350*l.* *per annum*, and settle them on himself for life, remainder to his wife for life, remainder to their first and other sons in tail, remainder to the heirs male of A. by any other wife, remainder to B. brother of A. for life, remainder to his first and other sons, &c. remainder to his second brother in like manner. And the question was,

4 *Brown, Par. Ca.* 26.

* was, whether B. was entitled, by the interposition of the court of Chancery, to have a specific execution of these articles? The objection was, that, as to him, they were merely voluntary; and that, therefore, the utmost the court could do, would be to decree that the brothers should have liberty to bring an action of covenant in the trustees' names, against the personal representative of A. in order to recover damages. But Lord *King*, chancellor, said, that as to what has been observed of putting the plaintiffs to sue the covenant in the names of the trustees in the marriage articles, for the recovery of damages, he did not think it an adequate remedy; the party who would be entitled to the greatest share of the damages would (in case any such were living) be the son of B. as having the first estate tail, but, there being then no such son, he did not see how he could have any part of the damages given in the action of covenant, were it to be brought: Also B. might die without issue, and then his younger brother might be entitled to the first estate of inheritance in the lands to be purchased, who, yet, could not come in for any part of the damages to be recovered on the covenant. But, he said, that if he decreed a specific performance, and a * settlement to be made according to the agreement, then each party entitled, or to be entitled, would have right and justice done them, if not before barred by a legal conveyance, viz. a common recovery. And his lordship decreed the articles to be specifically performed, which decree was afterwards affirmed on appeal to the house of Lords.

[* 253.]

[* 254.]

And Lord *Hardwicke*, in the case of *Goring and Nash*, recognized the principle that governed, and approved the decision, in the last case, relying upon it as one ground for the decree he then made; observing, that, in such cases, if the trustees recovered in an action at law out of the real assets of the covenantor, the covenantees might come into a court of equity to have the assets laid out in the purchase of lands: Now, that would be such a circuitry as ought not to be allowed in equity, as it would be more adequate justice to decree it immediately.

But it is necessary here to observe, that there are circumstances under which a court of equity will enforce a specific performance of agreements, on which no action can be maintained at law; of this nature are conditions

3 Atk. 135.
et vide *Stephens*
v. Trueman,
1 Vez. 73.
et *Whitmel v.*
Farrel. 1 Vez.
256. where this
distinction
taken, and the
court refused
to decree a spe-
cific execution,
because no ac-
tion would lie
by the trustees.

[* 255.]

conditions * of bonds extinguished and gone, by reason of the obligees becoming executors to the obligor; or by the obligor's marrying the obligee, by which the obligation becomes suspended, and consequently not actionable afterwards, because a personal action once suspended is extinct. Several instances of which we have already stated; but, in these cases, the court does not proceed upon that part of its jurisdiction which authorizes it to carry agreements specifically into execution; for if it did, the objection that there was no consideration, consequently no ground to maintain an action for damages at law, and therefore no foundation for the court of Chancery interposing, on the principle that it can give more effectual relief than the remedy a court of law affords (equity in this as in all cases following the law) would apply. But equity takes cognizance of such causes, upon the ground of its own proper jurisdiction over trusts, fraud, or accident; in which instances its jurisdiction is not entrained by a respect to legal niceties before alluded to.

[* 256.]

Park v. Willson;
20 Mod. 515.
et vide *Cannell*
v. Buckle,
2 P. Will. 343.
Alison's case,
9 Mod. 62.

Therefore, where A. and B. being brother and sister, and B. the sister having issue two *daughters and one son, A. intending that his sister's son should have his copyhold land, resolved to surrender it to the use of his will, and to devise it to him; but not being able to effectuate this intention, by reason of the officers of the court being out of the way, and so the surrender not practicable, his (A.'s) sister consented to enter into a bond to her son, that she would at any time, upon payment of 200*l.* and upon the request of her son, surrender the estate to him. Then A. the brother died, and afterwards the son died. Then the mother died, having devised this copyhold to one of her daughters. Upon which the other daughter brought her bill, praying a decree for a surrender, and proper conveyance of a moiety of the land, which she would have been entitled to as heir to her brother, had her mother surrendered it to him according to the condition of the bond. One ground of argument offered against this claim, was, that the brother having died intestate, the mother, the obligor, had taken out administration to him, and that there had been no request made by *Anthony* during his life for the surrender; by which circumstances the bond was become extinguished at law, and therefore ought not to be set up in equity.

equity. *Sed per * curiam.* It is plain from the nature of this transaction, that it was the fixed intention of the uncle, that one way or other, his nephew should have the land. Being disappointed in his intention of surrendering it, in order so to devise it, he had recourse to this bond to secure it to him, which, therefore, on the part of the mother, amounts to an agreement that the son shall have the land. Then the mother must be considered as a trustee for her son; in which case the court will have no regard to the niceties of law, of the bond being extinguished and gone, either by the obligor being administratrix to the obligee, or for want of a request: And a surrender and conveyance was decreed accordingly.

[*257.]

That the principle above mentioned, is the true ground upon which courts of equity proceed in these cases is clear, from the circumstance, that agreements of this nature, which are in fact trusts, although not in writing, will be decreed to be specifically executed, notwithstanding the statute of frauds and perjuries; which we have seen agreements, in the nature of trusts, depending simply upon their own intrinsic circumstances, will not. It was so determined in the case of *Thynn* and * *Thynn*, where T. deceased, having made a will and his wife sole executrix, his son, hearing thereof, came to his mother in the lifetime of his father, and persuaded her, that, there being many debts, the executorship would be troublesome to her, and desired that he might be named executor, for that he, by reason of his privilege in parliament, could struggle better with the creditors; and he procured her to move his father in it, declaring that he would only be an executor in trust for her: she accordingly prevailed with the father that it might be so; and a new will was made, and the son appointed sole executor, and only a legacy of 50*l.* given to the mother. The father died, and the son set up for himself, and denied the trust for the mother. And on a bill filed by her, it appearing upon the whole matter, to be as well a fraud as a trust, the lord keeper, notwithstanding the statute of frauds and perjuries, decreed the agreement in favor of the mother.

[* 258,]
Thynn v.
Thynns, 1
Vern. 296.

Those cases, likewise, in which the court of Chancery has carried into execution agreements entered into with infants, wherein it is also clear that an action cannot be brought at law for damages, appear to be founded

2 P. Will. 245.

[* 259.] founded on the * exclusive jurisdiction the chancellor possesses, as the guardian of infants, over their acts, by virtue of which, he assumes the power of restraining them from rescinding contracts, and also of carrying into execution contracts entered into by them, where the object is clearly for the benefit of the infant concerned : And permitting such contracts to be infringed, would tend to the injury of infants in general, by discouraging the contracting with them, even upon the fairest and most beneficial terms to themselves.

Melwold v.
Walbank,
2 Vez. 238. et
vide 3 Ark.
389.

The power of decreeing agreements being discretionary ; if an agreement be to do a thing, which in its tendency would encourage extortion, or promote inebriety, a court will not decree it in specie. Therefore, Lord Hardwicke dismissed a bill brought, to carry into execution an agreement for the assignment of the fees and profits of the office of keeper of Bridewell, and of the profits of the tap-house : Observing, that he never would suffer the keeper of a house of correction to assign over the profits and fees of his office ; for it must plainly lead to oppression and extortion, and ought not to receive countenance. And, as to the latter part of the agreement, his * lordship said, that it tended to increase riot and debauchery amongst the prisoners.

[* 260.]

Haves v. Caryl,
1 Brown's
cases, Par. 27
5 Vin. Abr.
538. Pl. 18
Ground of law
and equity,
18. c. 6.

And, where one party has trifled, or shewn a backwardness in performing his part of the agreement ; equity will consider this as a good objection to a specific execution being decreed in his favor, especially if circumstances are altered in the mean time.

† Where a contract has lain dormant for many years, there shall be no specific performance.

+ Wingfield v.
Whaley, 5 Vin.
Abr. 534. Pl.
38.

‡ But special circumstances may alter the case : As if there be articles on marriage to purchase lands, and to settle them within three years ; these shall not be waved by length of time, if the covenantor happen to have been in trade, and could not spare the money.

+ Vide Treat.
of equity 37.

Having gone thus far in explaining the principles, upon which a court of equity refuses its interposition, I shall, now, Secondly, endeavor to point out principles, by which we may judge when a court of equity will not refuse its aid in decreeing a specific execution

REFUSE TO INTERFERE WITH CONTRACTS, &c.

*cution of agreements ; or what cases furnish exceptions to the before-mentioned rules of equity.

[* 261.]

It is no objection to the specific performance of an agreement, that it operates in nature of a wager ; and, in that light, is rather the subject for damages : Therefore, where A. having a lease from the dean and chapter of ——— sold it to B. and it was agreed, that upon A.'s abating part of the money, B. should, upon the restoration of the king, and of the dean and chapter, reconvey it to A. a specific performance of the agreement was decreed, notwithstanding it was objected, that being in nature of a wager, it was a subject more adapted to the jurisdiction of a court of law.

Parker v.
Palmer,
1 Chan. Ca.
42. S. C. 1 Eq.
Ca. Abr. 17, 2.

Though an agreement be founded in misrepresentation, as on a false suggestion : As if one party agree upon an opinion (raised by false impressions, that he has not, when, in truth he has a title) to permit another to enjoy lands ; this will be no objection to its being decreed, if there be a ground of equity more favourable in support of it, than this furnishes * in derogation of it : As if it give efficacy to the intention of a testator.

[* 262.]

Thus, where one (seised in tail of freehold lands, with remainder to his elder brother, and of copyhold lands in fee) devised his freehold lands to his younger brother, and the copyhold lands to his elder brother, and died ; and the devisees agreed, by writing under their hands, that the lands should be enjoyed by each of them accordingly ; which agreement the elder was induced to enter into by the younger *pretending that the devisor had suffered a recovery*, and produced an exemplification thereof : The agreement, *although, on investigation, it turned out that no complete recovery had been suffered*, was decreed to be specifically carried into execution, being consonant to the testator's intention ; and a bill of review was dismissed with costs.

Frank v.
Frank, 1 Ch.
Ca. 84. et vide
Cann v. Cann.
1 P. Will. 723.

And a court of equity would decree an agreement, notwithstanding the plea of its having been entered into under a mistake, if the effect of it were to dispense with a forfeiture ; because courts of equity always favour any contract, which restrains its meddling in cases of that kind.

Vide Pullen, v.
Ready, 2 Atk.
587.

Y y

But,

Broderick v.
[* 263.]
Broderick,
1 P. Will. 239.
et 1 Vern. 20.
vide infra.

* But, unless in cases, circumstanced as those last mentioned, wherein the effect of the agreement is equitable as between the parties *in the particular predicament* in which they stand, ignorance in a party of his right, or its being concealed from him by the person with whom he stipulates, will, it seems, be a sufficient inducement for denying such person, at least, the assistance of a court of equity; for *suppressio veri*, or *suggestio falsi*, each of them furnish not only a solid objection in equity to give effect to, but sufficient grounds for setting aside, any instrument.

Per Lord
Hardwicke,
2 Atk 592.

But in cases, where, if there be any mistake, it is the mistake of all the parties to the agreement, and no one is more under an imposition than another; courts of equity hold, that to shake them on that account would be mischievous, tending to make all agreements vain and nugatory. And in such case the mistake is not the occasion of the promise, therefore the act is valid, there being nothing wanting of the true assent on all sides.

Vide Pullen v.
[* 264.]
Ready, 2 Atk.
591.

And if parties are entering into an agreement, and the instrument containing information * respecting *that*, in which the mistake is said to be, is lying before them and their counsel, while the draughts of the agreement are preparing; the parties will, in equity, be supposed to be acquainted with the consequences of law as to those points, and none of them will ever be relieved under pretence of mistake or surprise when such circumstances attend the case; for it is each of their business to search out the truth.

1 Atk. 11.
Cory v. Cory,
3 Vez. 19.

A court of equity will carry an agreement between a father and his children, made with a view to a just and proper family arrangement into execution, although it be objected, that the father has made use of his coercive power over one of his sons to force him into it; for although equity does not favour agreements made by compulsion, yet it always considers the reasonableness of the agreement. As if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted; though there may have been something of that sort, yet, if the agreement be reasonable, a court of equity will not set it aside: And upon this ground

Lord

Lord *Hardwicke* *thought that where an agreement was made to settle disputes in a family, and reasonable in itself, it was no solid objection, that one of the parties was drunk at the time of entering into it.

[* 265.]

A court of equity will decree a specific performance, notwithstanding it be objected, that the party stipulating had no interest in the thing stipulated for at the time of the contract made ; and the subject be of a nature that no contract, strictly legal, will attach upon for want of possession, on a distinction founded on the different modes in which courts of law and of equity enforce their decisions.

Thus where A. by articles between him and B. the plaintiff's father, reciting a marriage lately had between the plaintiff, nephew of A. and C. his wife, without the privity, consent, or good liking of B. did, for the considerations therein mentioned (amongst other things) covenant with B. to convey within one month after the death of D. who was A.'s brother, unto the plaintiff and his wife, or the survivor of them, and the heirs of the plaintiff, the manor of H. with the appurtenances, reserving an estate to himself for his life, and *gave a statute of 5000*l.* for performance ; and D. died, and the manor of H. descended to A. but charged with great debts ; the plaintiff's bill was to compel B. to perform the articles : And one objection was, that this was a covenant of one, not in possession, nor having any estate in the manor at that time, to settle ; and respecting lands over which, at the time of the covenant entered into, the party contracting had no power whereby he might charge the same, but a bare possibility, in case D. did not alien them. But the court, after great deliberation, and searching for precedents, was of opinion, that the agreement ought to be decreed in specie, the decree not binding the interest in the lands, but affecting the conscience of the party.

Wiseman v. Roper, 1 Ch. Rep. 84, 85.
Et vide *Hobson v. Trevor*, 2 P. Will. 191.
et *Longford v. Pitt*, infra.

[* 266.]

And it will make no difference in respect to performance in specie, although it be evident, from the person's own shewing who institutes the suit, that he had not, at the time of entering into the agreement, respecting which the suit is preferred, a good title to the hereditaments which are the subject of it.

Therefore where articles were entered into in *November 1725*, for sale of, and to convey an

Longford v. Pitt, 2 P. Will. 629.

[* 267.] * an estate, upon which conveyance the vendee was to pay 1500*l.* to the vendor ; and, on a bill preferred by the vendor against the representatives of the vendee to be paid the 1500*l.* the vendor's own witness proved, that, in 1728, the vendor had paid money to his eldest brother's daughter, being the heir general of the family, for her joining with her husband in a deed and fine to the use of the vendor and his heirs ; it was urged as a reason for refusing to decree the money, that it was evident by the vendee's own shewing, that, at the time of entering into the articles, he had not a good title to the premises : But the master of the Rolls said, that it was sufficient, if the party entering into the articles to sell, had a good title at the time of the decree ; the direction of the court in all these cases being to enquire, whether the seller can *then*, not whether he could at the time of executing the agreement, make a good title.

Lord Stourton
v. Sir T. Meer.
2 P. Will. 630.

And the court of Chancery, in the case of Lord Stourton against Sir Thomas Meer, more than once indulged the former (who, at the time of the articles for a sale of land, and even when the decree was pronounced, could not make a title, the reversion in fee being in * the crown) with time for getting in this estate, which could not be effected without an act of parliament for that purpose.

[* 268.]

Vide Sidney v.
Sidney, 3 P.
Will. 276.
2 Eq. Ca. Abr.
29. Pl. 37.

A charge of adultery or elopement, positively made, is not a ground for a court of equity to refuse a decree for a specific performance of marriage articles : Because, the import of them being generally, that the husband shall settle such and such lands on his wife for her jointure, they take effect as giving an interest in the nature of a vested jointure ; inasmuch as what is covenanted to be done for a good consideration, is considered in equity as done : Consequently the wife's right under them being, in effect, a jointure, is not forfeitable either for adultery or elopement.

A court of equity will decree an agreement, although it be objected, that it refers to foreign customs ; *provided* the distinct *quantum* of interest each person is to have in that which is the subject of the contract, be capable of being ascertained.

Fcaubert v.
Turff, Pre.
Chan. 297.
3 Bro. Par. C2.
19.

Therefore where, on a marriage in *France* it was stipulated, that the husband surviving the wife, should have

*have three hundred livres by way of a present, and also two thirds of her fortune for life (whereas by the custom of *Paris*, where they married, he would have had but a moiety) and that the rest should go according to the custom of *Paris*: It was determined, on appeal to the house of Lords, from a decree of the lord keeper, that this contract should be carried into execution *in toto*, and not restricted only to the sum stipulated: For the saying the rest should go according to the custom of *Paris*, was, in effect, the same as if the circumstances of that custom had been recited at large in the instrument.

[* 269.]

Lord *Hardwicke*, in the case of *Hinton* against *Hinton*, where an agreement was entered into between a father and a son while the father was in gaol, thought that circumstance an objection to the court decreeing a specific performance; unless all the facts attending it were precisely stated, and the agreement cleared from the suspicions of impropriety, which that accident threw upon it *prima facie*: But his lordship had no doubt but that a man might make an agreement in gaol, provided he had proper assistance and advice, and that it were *done in a fair manner, and for a full consideration. And all those circumstances being made out to his satisfaction in this case, his lordship decreed the agreement, though made under that predicament, to be carried into effect.

Hinton v. Hinton, 1 Vez. 531.

[* 270.]

Where the *public interest* is concerned, the court of Chancery will decree a specific performance of an agreement, although there be persons concerned in the subject contracted about, who are not parties to the suit.

Thus, where the bill was to have a decree for an inclosure, upon the foundation of an agreement entered into: It appearing by the bill that there were, by the agreement, to have been eighteen allotments, and that there were but fifteen parties to the suit, it was objected, that all the parties to the agreement were not parties to the suit. But the court decreed the agreement to be performed, saying, that it should not be in the power of one or two wilful persons to oppose a public good.

So, if an agreement be made between a lord and his tenants touching the stint of common, and one or two

Thirveton v. Collier,
3 Ch. Rep. 8.
Et vide *Lady Widrington's case*, cited
2 Vern. 225.
Sed vide
2 Vern. 103.
where this was denied to be the rule on a bill for an inclosure.
Delabec v. Beddingfield,
2 Vern. 103.

[* 271.] two capricious tenants will not come in ; a specific execution will, nevertheless, be decreed, founded on its being proper on principles of natural equity.

One of the parties to a contract being by himself incapable of performing it, furnishes no ground for dispensing with a specific execution.

Parrington v.
Horn, 2 Eq. Ca.
Abr. 17. 7.
5 Vin. Abr.
547. 15.

Thus where, on a bill to compel the defendant and his wife, to join in a fine to the plaintiff, pursuant to the covenant of the former in a conveyance, the defendant, his wife, and son, set forth in their answer, that the husband was tenant for life, remainder to his wife for life, remainder to the heirs of the husband begotten upon the wife, remainder to the husband's heirs ; and insisted, that nothing passed by the conveyance, but an estate for life of the husband, and that the wife did not seal the deed : Lord Cowper, Chancellor, decreed, *notwithstanding*, that the husband should procure his wife to join with him in a fine according to his covenant ; since he had taken upon himself so to do, *and the plaintiff had paid the full value of the estate.*

[* 272.]
Gibson v.
Gower, et al.
Finch 164.

* So, where A. tenant for life, agreed with B. that B. paying a certain rent, should open mines in his settled estate, and set on foot works at his own charge, and should enjoy the same for ten years, if A. or any of his issue male should so long live, and B. entered accordingly, and expended money in building works, and paid the rent until he was interrupted : On a bill filed by him to have an execution of the agreement in specie, A. by his answer alleged, that he was only tenant for life, and subject to be called to account for waste, and could not execute this agreement, because it was inconsistent with his power so to do. But the court, nevertheless, decreed, that A. should execute his agreement in specie, as far as he was capable of doing it. And directed him to seal a lease for ten years.

Gibson v. Pat-
terson, 1 Atk.
52 1 Vez. 450.
2 Bro. Ca.
Par. 460.

Again, That the time limited for performance of an agreement is lapsed, is no solid objection to a decree for performance of it : For it is the business of a court of equity to relieve against lapse of time in the performance of agreements ; especially if the non-performance does not arise by default of the party

* party seeking to have a specific performance. Therefore a bill, brought for a specific performance, was decreed in favor of the plaintiff, without any regard had to the lapse of time, by reason of the plaintiff's negligence in not producing his title deeds, and not tendering a conveyance within the time limited for that purpose by the articles: The lord chancellor observing, that most of the cases which were brought in that court, relating to the execution of articles for sale of estates, were liable to this objection, but that he thought there was nothing in it.

[* 273.]

The change of the condition of a person entering into an agreement: As if he become lunatic; will not affect the right of the parties, but that will be the same as before, provided they can come at the remedy. This is consonant to a common maxim of the civil law, *that madness coming upon a man, destroys not any business which he had before duly performed.* Thus, if the legal estate is vested in the trustees of a lunatic, a court of equity ought to decree a performance, and the act of God will not change the right of the parties. But if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and reduce the * parties to the necessity of proceeding at law, where the lunacy of the party will be an impediment, by suspending the contract till he recovers the government of himself and of his actions.

Owen v. Davics, 1 Vez. 82.

[* 274.]

It is no objection to a decree for an execution in specie to say, that the agreement was *voluntary*, if it be an agreement to do that, which the court would have required to be done on application to them: As if a man, having run away with a girl possessing a good fortune in trustees' hands, after marriage agree to lay it out in lands to be settled in strict settlement; this will be binding; nor will a court of equity relieve a man's creditors against this agreement: Because, had the husband himself applied to the court for the money, the court would not have decreed it to him without such a settlement.

Moor v. Rycault, Prec. Ch. 22,



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- - - - - an agreement with a second wife, notwithstanding there be a first wife living, 2 vol. *ibid*.
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- - - - - in some cases, where there is no remedy at law, 2 vol. 14, 15.
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- Farther observations on this head of Equity, 2 vol. 17—19.
- require, that he who applies for their aid, shall have performed all that was contracted for on his part, 2 vol. 19.
- Nor will his having been prevented by the act of God, be any excuse for not having done so, if he had time to accomplish it, 2 vol. 20, 1.
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- - -, if new matter come out respecting an agreement, against which a decree has been made, support the agreement on an application by other parties not bound by the former decree, 2 vol. 138—140.

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- - - - - of an agreement, although it refer to foreign customs or usages, 2 vol. 267, 8.

- - - - - though one party be in gaol, if it be done in a fair manner, 2 vol. 268.

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of a thing expressly stipulated in a contract, shall be intended as things are, when the contract is to take effect, 408, 9.

V E N D E E

I N D E X.

V E N D E E

liable to all contingencies affecting an estate, purchased under executory articles in the intermediate time between the agreement and the conveyance, 2 vol. 61, 2. 64.

The principle upon which this rule is founded, *ibid*, 63, 4.

Examples and observations with respect to the principle of equity, on which this conclusion is founded, *ibid*. 63—79.

Vide BARGAIN, *Contingent*.

Quære, if it would be so where the money was *expressly* agreed to be paid *on the conveyance* being made, *ibid*. 68, 69.

or the parties are in *statu quo*, *ibid*. 74, 5.

Or, if the contract be not a contract of sale, but an agreement to make such a contract at a future time only, 2 vol. 79.

Vide MONEY.

V I L L A I N.

Vide BOND.

W A G E R I N G C O N T R A C T

s, not invalidated, on the ground of not being *in themselves* contingent, if the event equally uncertain to the parties, 146.

s, entered into, with a view to colour an immoral purpose, are void, 183, 4.

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To cover usury, *ibid*.

To bribe a judge, *ibid*.

To induce a counsel to act treacherously, *ibid*.

entered

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entered into with a view only of securing something to the losing party in a cause, is lawful, 184.
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W A R R A N T *of Attorney,*

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W I L L

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disposing of money, under an agreement to be laid out in the purchase of lands, need not be attested by three witnesses, 2 vol. 112, 113.

Quære, if limited as land, *ibid.*

- - - - - so circumstanced, under the description of *so much money*, agreed to be laid out in land, will make it pass as personal estate, *ibid.*

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to a deed, having a prior claim in what is conveyed thereby, not giving notice of it, bound by the alienation, 133.

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But he must know that what is conveying belongs to him, 134, 135.

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positive used in contracts or agreements, are to be accepted in their most common and vulgar use and signification, unless there be decisive reasons for conjecturing that the intent was otherwise, 373.

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used in the present tense, taken for the future, 374.

- - - in a contract, expressive of quantity, &c. shall take effect as they are understood where spoken, 376.

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ought to be taken out of their ordinary acceptation, where receiving them in that sense, will render a contract ineffective and frivolous, 382, 3.

exclusive may be taken to be inclusive to serve the intent, 382.

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M m m

may

may be accepted in a more narrow sense than that which they ordinarily import :

First, where the will of the speaker is not coextensive with his words, 387.

Secondly, where something exists inconsistent with the speaker's design, *ibid*.

Examples in both the preceding instances, 387—395.

Vide GRANT, CONDITION, CONFIRMATION.

ought, in construction, to be restrained to the matter in hand, though they admit a larger sense, 390—393.

Vide RELEASE, HEIRS MALE, MARRIAGE SETTLEMENT.

in their construction, shall not be taken to include things, that, could they have been foreseen by the speaker, would have been excepted, 393—395.

in a contract, of obscure and dubious import, which cannot be cleared up by reference to the intention of contracting parties, or other circumstance, and where all other rules of exposition fail, shall be construed in that sense which is most against him who uses them, 395—397.

Quære, as to the equity of this rule, *ibid*.

Exception to the above rule, where the contract or agreement contains something in its nature odious as a penalty, &c. 397.

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----- where such construction will work a wrong to others, 400.

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Examples, 403—405.

in

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necessary under the statute of frauds, to entitle persons claiming by virtue of marriage agreements, as well as others, to a specific execution, 277, 8.

Example, 278, 9.

Doubts formerly entertained, whether it was sufficient to entitle a party to a specific execution, "that the agreement was stipulated to be put into writing," 279—281.

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F I N I S.





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